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No. 2144

United States
Circuit Court of Appeals

For the Ninth Circuit.

ROBERT S. HALE,

Appellant,

vs.

AMES REALTY COMPANY, a Corporation, et al.,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Montana.

FILED

JUL 1 - 1912

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Circuit Court of Appeals
For the Ninth Circuit.

ROBERT S. HALE,

Records of
of appeal

Upon Appeal from the United States District Court for the
District of Montana.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Solicitors of Record.

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Solicitor for Defendant and Appellant

R. S. Hale.

O. W. McCONNELL, Esq., of Helena, Montana,
Solicitor for Complainant and Appellee.

Messrs. SHOBER & RASCH, of Helena, Montana.

CARL RASCH, Esq., of Helena, Montana.

M. S. GUNN, Esq., of Helena, Montana.

IRA T. WIGHT, Esq., of Helena, Montana.

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Messrs. H. G. & S. H. McINTIRE, of Helena, Mon-
tana.

C. A. SPAULDING, Esq., of Helena, Montana.

Messrs. GALEN & METTLER, of Helena, Montana.

EDWARD HORSKY, Esq., of Helena, Montana.

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California.

Solicitors for Defendants and Intervenors
not Appealing.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

No. 2144.

ROBERT S. HALE,

Appellant,

vs.

AMES REALTY COMPANY, a Corporation, et al.,
Appellees.

**Order Under Rule 16, Section 1, Enlarging Time
to May 18, 1912, to File Record Thereof and to
Docket Case.**

Good cause therefor appearing, it is ORDERED that the time within which the original certified Transcript of the Record in the above-entitled cause may be filed, and within which the appellant may docket the above-entitled cause with the clerk of this court at San Francisco, California, be and hereby is enlarged to and including the 18th day of May, 1912.

WM. W. MORROW,

United States Circuit Judge for the Ninth Judicial
Circuit.

[Endorsed]: No. 2144. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to May 18, 1912, to File Record Thereof and to Docket Case. Filed May 11, 1912. F. D. Monckton, Clerk.

*In the District Court of the United States, in and
for the District of Montana.*

No. 668—IN EQUITY.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corpora-
tion, and ROBERT S. HALE et al.,
Defendants.

BE IT REMEMBERED, that on the 2d day of
February, 1903, the complainant filed its Bill of
Complaint herein, which is in the words and figures
following, to wit: [1*]

*In the Circuit Court of the United States, Ninth Cir-
cuit, District of Montana.*

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corpora-
tion; Helena & Livingston Smelting and Re-
duction Company, a Corporation; Helena
Land and Improvement Company, a Corpora-
tion; Chicago Reduction Works, a Corpora-
tion; H. M. Hill, Ole Noer, Perry Parks,
James Clegg, Mary B. Logan, J. A. Fischer,
Christina Winslow, George Cockeli, John J.
Hall, Asleck Slenes, Marion D. Steves, James
J. Sweet, A. H. Moulton, Christian Nelson,

*Page-number appearing at foot of page of original certified Record.

Antone Semenech, William R. Sherman, Lawrence Wanderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Castner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Strobel, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warnech, Kate Cassidy, G. W. Jensen, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulholland, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clark, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield,

Defendants.

Bill of Complaint in Equity.

To the Honorable Judges of the Circuit Court of the United States, for the District of Montana:

Your orator, the Ames Realty Company, brings this bill of complaint against the above-named defendants, and thereupon your orator complains and says:

I. That your orator, the Ames Realty Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and is a resident and citizen of [2] the State of Missouri, and not a resident or citizen of any other State.

II. That the Big Indian Mining Company is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and is a resident and citizen of the State of Washington.

III. That the Helena and Livingston Smelting and Reduction Company is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, and is a resident and citizen of the State of Montana.

IV. That the defendant Helena Land and Improvement Company is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, and is a resident and citizen of the State of Montana.

V. That the defendant, Chicago Reduction Works, is a corporation, duly organized and existing under and by virtue of the laws of the State of Illi-

nois, and is a resident and citizen of the State of Illinois.

VI. That the defendant H. M. Hill is a resident and citizen of the State of California.

VII. That the defendant Ole Noer is a resident and citizen of the State of Idaho.

VIII. That the defendants, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenec, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Strobel, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie [3] Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, G. W. Jensen, D. W. Beach, Benjamin Borgstede, M. J. McDaniels, H. L. Goudy, James Boone, John Merri- gan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulholland, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clark, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L.

Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield, are all residents and citizens of the State of Montana.

IX. And *you* orator further shows unto your Honors that it is authorized by its articles of incorporation to own, enjoy and possess lands and water and water rights, and to use, cultivate and enjoy the same, and that it is the owner, in possession of and entitled to the possession of nineteen hundred twenty-six acres of agricultural lands, situated in Township Ten (10), in Ranges Three (3), Four (4) and Seven (7) West of the Principal Meridian, in the Prickley Pear Valley, in the County of Lewis and Clarke and State of Montana, which said lands, for the purpose of raising crops thereon, require to be irrigated and watered by artificial means. That in order to irrigate said lands for the purposes aforesaid, your orator, its grantors and predecessors in interest, on the first day of April, 1865, by means of certain ditches, tapped the waters of Prickly Pear Creek, in Lewis and Clark County, State of Montana, and carried and conveyed the same to and upon the lands of your orator, now owned and occupied by it, and thereby appropriated for the purposes aforesaid one hundred (100) inches of the waters of [4] the Prickly Pear Creek. That in order to further irrigate said lands for the purposes aforesaid your orator, its grantors and predecessors in interest, on the first day of April, 1866, by means of certain ditches tapped the waters of said Prickly Pear Creek

and carried and conveyed the same to and upon the lands of your orator now owned and occupied by it, and thereby appropriated for the purpose aforesaid one hundred and ninty (190) inches of the waters of said Prickly Pear Creek. That in order to further irrigate said lands for the purposes aforesaid your orator, its grantors and predecessors in interest, on the 6th day of April, 1866, by means of certain ditches tapped the waters of said Prickly Pear Creek and carried and conveyed the same to and upon the lands aforesaid, now used and occupied by your orator, and thereby appropriated for the purposes aforesaid one hundred and sixty-seven (167) inches of the waters of said Prickly Pear Creek.

X. That *you* orator, and its predecessors in interest, have been in the occupation and continued use, enjoyment and possession of the aforesaid respective number of inches of the waters of said Prickly Pear Creek under and by virtue of and through said appropriations ever since the date thereof.

XI. And your orator further shows unto your Honors that all of the lands owned by your orator are under cultivation; that the waters appropriated as aforesaid and now owned and used by your orator are necessary and indispensable in and about the cultivation of crops upon said land and raising and producing hay, grain and vegetables thereon.

XII. And your orator further shows unto your Honors that the defendants and each and every of them claim some right to the use of the waters of said Prickly Pear Creek and its tributaries, all of which

said tributaries empty into the Prickly Pear Creek, above the points of said Prickly Pear Creek where [5] your orator diverts its water, and the waters from the tributaries of said Prickly Pear Creek are necessary and requisite to swell the waters of said Prickly Pear Creek sufficient to enable your orator and other prior appropriators to defendants to satisfy their prior rights.

XIII. And your orator further shows unto your Honors that the defendants, and each and every of them, are appropriating large amounts of the waters of said Prickly Pear Creek and its said tributaries, and threaten to continue to do so, and thereby to diminish and exhaust the waters of said Prickly Pear Creek so that your orator will be deprived of the use and enjoyment of the amount of water so appropriated by it from said Prickly Pear Creek, and requisite and necessary to be used by it in the cultivation of its lands so that your orator will be greatly and irreparably damaged thereby.

XIV. And your orator further shows unto your Honors that any and all the rights which the said defendants, and each and every of them, may have in and to the waters of said Prickly Pear Creek, and to its tributaries, are subsequent, subject and subservient to the rights of your orator.

XV. And your orator further shows unto your Honors that the appropriations of said waters so made by your orator, and its predecessors in interest, are necessary for the purpose of cultivation and irrigation of crops and lands, and that unless the said defendants be enjoined and restrained from divert-

ing and turning away the waters of said Prickly Pear Creek and its tributaries by means of ditches, your orator will be unable to cultivate its lands and raise crops of hay, grain and vegetables thereon.

XVI. And your orator further shows unto your Honors that by reason of the diverse interests of each of the defendants it is necessary that all and every of the claimants to the waters of said Prickly Pear Creek, and to its tributaries, be joined [6] and made defendants herein in order to avoid a multiplicity of suits.

XVII. And your orator further shows unto your Honors that its right to the use of the waters of said Prickly Pear Creek for the purposes aforesaid is of great value and exceeding the sum of Two Thousand Dollars (\$2,000.00), and that unless the said defendants are restrained and enjoined from diverting and using the waters of said Prickly Pear Creek, the value and utility of your orator's rights will be destroyed and lost to your orator.

Forasmuch as your orator can have no plain, speedy or adequate relief except in this Court, and to the end therefore that each and all of the parties who appropriated water from the said Prickly Pear Creek, and its tributaries and branches, at a point or points above the place where your orator diverts the said water be required to answer and set up whatever rights they may have in and to the waters of said Prickly Pear Creek, and its branches and tributaries, and make a full disclosure according to their best knowledge, remembrance, information and belief, and a full, true, direct and perfect answer

make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived, to the end that the rights of the respective parties hereto may be established and fixed by decree of this Court; and your orator prays that such decree may be made herein adjudicating the rights of your orator and the rights of the defendants in the premises, so that the said defendants, their servants, officers, agents, attorneys, and employees, and each and every of them, may be restrained and enjoined by order and injunction of this Court from diverting any of the waters of said Prickly Pear Creek, and its branches and tributaries, until the prior rights of your orator to said waters are first [7] satisfied.

And may it please your Honors to grant unto your orator a writ of subpoena issuing out of and under the seal of this Honorable Court, directed to the said defendants, commanding them by a certain day, and under a certain penalty, to be and appear in this Honorable Court, and then and there to answer to the premises and to stand to and abide by such order and decree as may be made against them; and for costs of suit.

And your orator will ever pray.

McCONNELL and McCONNELL,

Solicitors for Complainants and of Counsel. [8]

United States of America,

District of Montana,

County of Lewis & Clarke,—ss.

On this the 31st day of January, A. D. 1903, before the undersigned, a notary public in and for Lewis

And thereafter, on February 2, 1903, a subpoena in equity was duly issued herein, which is in the words and figures following, to wit: [10]

[Subpoena.]

UNITED STATES OF AMERICA,

*Circuit Court of the United States, Ninth Judicial
Circuit of Montana.*

IN EQUITY.

The President of the United States of America, Greeting: To Big Indian Mining Company, a Corporation, Helena and Livingston Smelting and Reduction Company, a Corporation, Helena Land and Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christina Nelson, Antone Semenech, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Strobel, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, G. W. Jensen, D. W. Beach, Benjamin Borstede, M.

J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulholland, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clark, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield, Defendants. [11]

YOU ARE HEREBY COMMANDED, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Helena, on the second day of March, A. D. 1903, to answer a bill of complaint exhibited against you in said court by Ames Realty Company, complainant, who, is a citizen of the State of Missouri, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of FIVE THOUSAND DOLLARS.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 2d day of February, in the year of our Lord one thousand nine hundred and three, and of our Independence the 127th.

[Seal]

GEO. W. SPROULE,
Clerk.

MEMORANDUM PURSUANT TO RULE 12,
SUPREME COURT U. S.

You are hereby required to enter your appearance in the above suit on or before the first Monday of March next, at the Clerk's office of said Court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

[Seal]

GEO. W. SPROULE,

Clerk.

McCONNELL & McCONNELL,
Solicitors for Complainant,
Helena, Montana. [12]

United States of America,
State of Montana,
County of Lewis and Clarke,—ss.

Hugh H. Rogan, being first duly sworn according to law, deposes and says: That he is a citizen of the United States, over the age of eighteen years, and in nowise interested in the action of the Ames Realty Company against the Big Indian Mining Company et al.; that he received the annexed subpoena on the 2d day of February, 1903, and personally served the following defendants on the dates mentioned by delivering to each of said defendants personally a copy of said subpoena, to wit: On February 2d, Helena and Livingston Smelting and Reduction Company, Helena Land and Improvement Company, R. S. Hale, T. H. Carter, Antone Semenc; on February 3d, Reynolds Prosser, D. W. Beach and Charles A. Donnelly; on February 4th, I. B. Cutler, Davis C. Turner, William R. Sherman, Lawrence Wonderer, E. L. Marks, Charles B. Zastrow, Harry

Johnson, Trued Swanson, Otto Hofstead; on February 5th, Lind Warneck, Michael Foley, Kate Cassidy, G. W. Jensen, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, and James Boone; on February 6th, Lizzie Bailey, M. A. Haynes, J. Ellis and Robert Lynnes; on February 7th, John Haab, Edward Heater, Robert Strobel, Margaret P. Roe, Malcolm D. McRae, George Herbert, Herman Freyler, Charles Koegel, H. O. Nash, Anna E. Nash, Chris Wickersham, Perry Parks, Christian Nelson; on February 9th, A. H. Moulton, Marion D. Steves, Charles O'Connell, Martin Broen, Nellie R. Ricketts, James J. Sweet, Asleck Slenes, John J. Hall, George Cockell, I. W. Marks, Chris Robertson, Christine Winslow, J. A. Fischer, William Ogilvie, and Benjamin Wahle; on February 10th, J. B. Maxfield, Gus Ruegg, James H. Mulhollen and John T. Murphy; on February 11th Jacob Kahler, William Bevins, Benjamin Z. Young; on February 12th, Joseph W. Young, John Pohl, James A. Carrier, and James Clegg; on February 14th, B. N. J. Miljouer, and E. J. Harris; on February 16th, Gerhard Thies.

HUGH H. ROGAN.

Subscribed and sworn to before me this the 16th day of February, 1903.

[Notarial Seal]

O. W. McCONNELL,

Notary Public in and for Lewis and Clarke County,
State of Montana. [13]

United States of America,

State of Montana,

County of Cascade,—ss.

David Ledbetter, being first duly sworn according

to law, deposes and says: That he is a citizen of the United States, over eighteen years of age, and is nowise interested in the action of the Ames Realty Company against the Big Indian Mining Company, et al.; that he received the annexed subpoena on the — day of February, 1903, and personally served the same upon the defendant Fred Hart on the 23d day of February, 1903, by delivering to said defendant personally a copy of said subpoena.

DAVID LEDBETTER.

Subscribed and sworn to before me this the 23 day of February, 1903.

[Notarial Seal] RICHARD BENNETT,
Notary Public in and for the County of Cascade,
State of Montana.

Fees, \$1.00. [14]

United States of America,
State of Montana,
County of Cascade,—ss.

T. Rush, being first duly sworn according to law, deposes and says: That he is a citizen of the United States, over the age of eighteen years, and in nowise interested in the action of the Ames Realty Company against Big Indian Mining Company et al.; that he received the annexed subpoena on the 25th day of February, 1903, and personally served the same upon the defendant, William Albright, on the 28th day of February, 1903, by delivering to said defendant personally a copy of said subpoena.

T. RUSH,
Constable.

Subscribed and sworn to before me this, the 2d day of March, 1903.

[Notarial Seal] HENRY L. DESCOMBS,
Notary Public in and for Cascade County, Montana.

Notarial Fee.....	.50
Constable.....	.20

[15]

[Endorsed]: No. 668. United States of America, Circuit Court of the United States, Ninth Circuit of Montana. Subpoena. Filed and Entered Mar. 19, 1903. Geo. W. Sproule, Clerk. By Fred H. Drake, Deputy. McConnell & McConnell, Solicitors for Complainant, and of Counsel. [16]

And thereafter, on March 19, 1903, a subpoena toties quoties was duly issued herein, which is in the words and figures following, to wit: [17]

[Subpoena Toties Quoties.]

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana.

IN EQUITY.

The President of the United States of America, Greeting: To Big Indian Mining Company, a Corporation, Peter Leary, Mary Leary, Defendants.

YOU ARE HEREBY COMMANDED, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom, in Helena, Mon-

tana, on the 4th day of May, A. D. 1903, to answer a Bill of Complaint exhibited against you in said court by Ames Realty Company, a corporation, Complainant, who is a citizen of the State of Missouri, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under penalty of FIVE THOUSAND DOLLARS.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 19th day of March, in the year of our Lord one thousand nine hundred and three, and of our Independence the 127th.

[Seal]

GEO. W. SPROULE,
Clerk.

By Frederick H. Drake,
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12,
SUPREME COURT U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of May next, at the Clerk's office of said Court, pursuant to said Bill; otherwise the said Bill will be taken *pro confesso*.

GEO. W. SPROULE,
Clerk.

By Frederick H. Drake,
Deputy Clerk.

McCONNELL & McCONNELL,
Solicitors for Complainant, Helena, Mon-
tana.

United States Marshal's Office,
District of Montana.

I hereby certify, that I received the within writ on the 19th day of March, 1903, and personally served the same on the 25th day of March, 1903, by delivering to, and leaving with Colin McIntosh, Manager of the Big Indian Mining Company in the County of Lewis and Clark and District of Montana, a copy of the within subpoena.

C. F. LLOYD,
U. S. Marshal.
By C. F. Gage,
Deputy Marshal.

[Indorsed]: Title of Court and Cause. Subpoena Toties Quoties. Filed April 14, 1908. Geo. W. Sproule, Clerk. [18]

And thereafter, on July 15, 1903, the Answer of defendant, R. S. Hale, was duly filed herein, being in the words and figures following, to wit:
[19]

[Answer of R. S. Hale to Bill.]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, Helena and Livingston Smelting and Reduction Company, a Corporation, Helena Land and Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks,

James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenech, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Strobel, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, G. W. Jensen, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, Willian Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris. Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clark, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield,

The answer of R. S. Hale to the bill of complaint of the Ames Realty Company, complainant.

The defendant, R. S. Hale, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception which can or might be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto or to so much and such parts thereof as this defendant is advised it is material or necessary for him to make answer unto, answering says:

1. This defendant admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of complainants bill of complaint.

2. This defendant has not sufficient knowledge or information concerning the allegations or any thereof contained in paragraph 9 of complainant's bill of complaint and therefore denies the same.

3. This defendant admits that he claims a right to the use of a portion of the waters of Prickly Pear Creek and its tributaries as is hereinafter more fully set forth and alleged, and that the tributary from which this defendant takes and obtains the water used by this defendant is above the points on said Prickly Pear Creek where the complainant diverts its water, but denies that the waters from the tributary of said Prickly Pear Creek to the use of which this defendant is entitled are necessary or requisite to swell the waters of said Prickly Pear Creek sufficient to enable the complainant or any other appropriator to set out the rights to which they are entitled.

4. This defendant admits that this defendant is appropriating large amounts of the waters of said Prickly Pear Creek and a tributary thereof, but denies that this defendant is using or has at any time used any waters of said Prickly Pear Creek or any tributary thereof to which the complainant is in any way or manner, or to any extent [21] whatever entitled.

5. This defendant denies that the right of this defendant is subject, subsequent or subservient to the rights of the complainant, and avers to the contrary that this defendant's rights as herein set out are prior and superior to any right of the complainant in and to any of the waters of said Prickly Pear Creek and its tributaries.

6. This defendant denies each and every material allegation in said complainant's complaint contained, not herein otherwise specifically admitted or denied.

And this defendant for further answer to the complainant's said bill of complaint alleges and sets forth:

1. That this defendant is a citizen of the United States of America, and is now, and through his grantors and predecessors in interest has been, ever since the year 1869, the owner in the possession and entitled to the possession of a certain mining ditch known as the Park Ditch, commencing at the intersection of said ditch with Lump Gulch Creek in the County of Jefferson, at a point about 200 feet below the junction of the said Lump Gulch Creek and the waters from Park Lake, extending thence into the County of Lewis and Clarke, in the State of Mon-

tana, by means whereof the said defendant, his grantors and predecessors in interest, did on the first day of March, 1864, appropriate and divert all the waters of Lump Gulch, being about five hundred inches, and did and does carry and convey said waters and use the same upon divers and sundry mining lands, and other lands belonging to this defendant and others, in the County of Lewis and Clarke, State of Montana, for [22] the purpose of mining and developing said mining claims and for agricultural, domestic and other useful purposes, and that the said waters have been so used by this defendant, his grantors and predecessors in interest continuously, uninterruptedly, for mining and other useful purposes, since the date of appropriation thereof, and that the right of the said defendant to the use of said waters and all of said waters of said Lump Gulch Creek, the same being a tributary of Prickly Pear Creek, for mining, agricultural, mechanical, domestic and other useful purposes, and the right to reservoir and store said waters for said purposes is superior to any and all rights of the said complainant and each and every of this defendant's codefendants in said action.

Wherefore this defendant having fully answered the said complainant's bill of complaint, asks to be dismissed with his costs in this behalf expended.

R. S. HALE.

Defendant.

MASSENA BULLARD,

Solicitor for Defendant, R. S. Hale.

Due service of foregoing answer and receipt of copy acknowledged this fifteenth day of July, 1903.

McCONNELL & McCONNELL,

Solicitors for Complainant. [23]

[Endorsed]: No. 668. In the Circuit Court of the United States, Ninth Circuit, District of Montana. Ames Realty Company, a Corporation, Complainant, vs. Big Indian Mining Company, a Corporation, et al., Defendants. Answer of Defendant R. S. Hale. Filed July 15, 1903. Geo. W. Sproule, Clerk. Masena Bullard, Attorney for Defendant, R. S. Hale, Helena, Montana. [24]

And thereafter, on July 15, 1903, the Cross-bill of defendant R. S. Hale was duly filed herein, which is in the words and figures following, to wit: [25]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN ~~MINING~~ COMPANY, a Corporation, Helena and Livingston Smelting and Reduction Company, a Corporation, Helena Land and Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James

J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenech, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Strobel, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, G. W. Jensen, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clark, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield,

Defendants. [26]

Cross-Bill of Complaint in Equity [of R. S. Hale].

To the Honorable Judges of the Circuit Court of the
United States, for the District of Montana :

Your orator R. S. Hale, of Helena, Lewis and Clarke County, State of Montana, and a citizen of the United States and a resident of the State of Montana, brings this his cross-bill of complaint against the above-named complainant, Ames Realty Company, a corporation, and his codefendants mentioned and named in said above-entitled cause, and there-upon your orator complains and says:

That heretofore, to wit, on the 2d day of February, A. D. 1903, the said Ames Realty Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, filed its bill of complaint in this Honorable Court against your orator, and against all of the said above named and mentioned defendants, all of whom are residents and citizens of the State of Montana, except the said Big Indian Mining Company, a corporation, a resident and citizen of the *of the* State of Washington, and the said Chicago Reduction Works, a corporation, which is a resident and citizen of the State of Illinois, and the said H. M. Hill, who is a resident and citizen of the State of California, and the said Ole Noer, who is a resident and citizen of the *State Idaho*, in which, its said bill of complaint, it is alleged by the Ames Realty Company, complainant therein, that it is the owner of Nineteen hundred and twenty-six acres of agricultural lands in township number ten (10), in range number three (3),

four (4) and seven (7), west of the Principal Meridian, in the Prickly Pear Valley, Lewis and Clarke County, Montana, which, for the purpose of raising crops thereon, require to be irrigated and watered by artificial means. That it is therein further alleged that in order to irrigate said lands for the purpose of raising crops thereon, said Ames Realty Company, its grantors and predecessors in interest appropriated certain waters from Prickly Pear Creek, in the County of Lewis and Clarke, State of Montana, and [27] carried and conveyed the same to and upon its said lands, which said waters, it is alleged, are requisite and necessary to properly irrigate said lands and raise crops thereon. That it is further alleged in said bill of complaint that your orator and his said codefendants mentioned therein claim some right to the use of said waters of said Prickly Pear Creek and its tributaries, and are appropriating large amounts of the waters of said Prickly Pear Creek and its tributaries, but that the rights of your orator are subsequent, subject and subservient, to the rights of said complainant in said bill of complaint, the Ames Realty Company praying that a decree of this Honorable Court be entered adjudicating the rights of the said complainant, Ames Realty Company, and the rights of your orator and his codefendants therein, so that the defendants named in said bill of complaint, their servants, officers, agents, attorneys, and employees may be restrained and enjoined by order and injunction of this Court from diverting any of the waters of said Prickly Pear Creek, and its branches and tributaries

until the alleged prior rights of said complainant in said bill of complaint to said waters are first satisfied.

And your orator further shows that he has served and filed his separate answer to said bill of complaint, and that the said cause has not yet been heard, and that to the end that the rights of your orator, and the said complainant and the defendants mentioned and named in said bill of complaint and herein shall be fully adjudicated, and their rights in and to the said waters of the said Prickly Pear Creek and its tributaries and branches be established and finally decreed, it is necessary that your orator exhibit and file this, his cross-bill of complaint against the complainant in said bill of complaint, and against each of his said codefendants mentioned in said above entitled cause. [28]

And your orator further shows unto your Honors that the said Ames Realty Company is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri; that the said Big Indian Mining Company is a corporation duly organized and existing under and by virtue of the laws of the State of Washington; that the Helena and Livingston Smelting and Reduction Company is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, and the Chicago Reduction Works is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois. That the said H. M. Hill, is a resident and citizen of the State of California, that the said Ole Noer is a resident and citi-

zen of the State of Idaho, and that all of the others of your orator's codefendants are residents and citizens of the State of Montana.

And your orator further shows unto your Honors that your orator is a citizen of the United States of America and is now and ever since the 19th day of January, 1875, has been the owner in the possession and entitled to the possession of that certain ditch known as the Park Ditch leading from the Park Lake and Lump Gulch in the County of Jefferson, State of Montana, to the Park mines near Unionville, in Lewis and Clarke County, and to other mining lands and agricultural lands in said Lewis and Clarke County, and that your orator is the owner of large tracts of mining ground and property in said Lewis and Clarke County, upon which mining ground your orator, his grantors and predecessors in interest have, during all the years since and including the year 1875 used water through said ditch for the purpose of mining, developing, and exploring said mining ground; that said ditch taps and intersects the waters of said Lump Gulch Creek and said Park Lake and carries and conveys all of said waters to and upon said mining ground, and upon other real estate lying along the line of said ditch and in the vicinity thereof.

And your orator further shows unto your Honors that your orator, his grantors and predecessors in interest, have been by prior appropriation, the owners of all the said waters of Lump Gulch [29] and Park Lake above the point where said waters are intersected by the said Park Ditch and of the right

to use said waters for mining, agricultural, domestic, mechanical and other useful purposes, ever since the first day of March, 1864, and ever since the nineteenth day of January, A. D. 1875 has been in the actual, continuous and exclusive use of said waters and in the open and notorious possession and enjoyment thereof as against the plaintiff, its grantors and predecessors in interest, and as against each of this defendant's codefendants and their and each of their grantors and predecessors in interest, and against every person whomsoever, and is entitled to the use and enjoyment of said waters as well against the plaintiff herein as against each of this defendant's codefendants.

And your orator further shows unto your Honors that the said complainant and all of your orator's codefendants mentioned in said complainant's bill of complaint claim some right, title or interest by virtue of appropriation to the use of the waters of said Prickly Pear Creek and its tributaries, and are using the same. That the value of the right of your orator to the use of said waters for the purposes aforesaid exceeds the sum of two thousand dollars. That the right of said complainant and said codefendants to the use of the waters of said Prickly Pear Creek and its tributaries, are subordinate and subservient to the rights of your orator to use the waters of said Lump Gulch Creek and Park Lake. That it is necessary that a decree of this Court be made and entered in which it shall be adjudicated and determined the amounts of water to which your orator and the said complainant, and the said several defendants herein

named are entitled to use, according to their several rights and priorities in the use of the same, and that your orator's right and title to the use of the said waters of Lump Gulch Creek and Park Lake be quieted by decree of this Court.

Forasmuch as your orator can have no adequate relief, except in this Court, and to the end therefore that the complainant and the defendants may, if they can, show cause why your orator should not have the relief hereby prayed, and may make full disclosure according [30] to their best knowledge, remembrance, information and belief, and a full, true, direct and perfect answer make to the matters hereinbefore set out, but not under oath, an answer under oath being hereby expressly waived.

Your orator prays that such decree may be made herein adjudicating the rights of your orator and the rights of the complainant and the defendants in the premises in and to the waters of said Prickly Pear Creek and its tributaries, and for an injunction restraining the said complainant mentioned in said bill of complaint and other parties to this suit, their servants, agents, attorneys, and employees, and each and every of them, from in any manner interfering with the rights of your orator, to the end that he may have the use of the waters of said Lump Gulch Creek and Park Lake and its tributaries, according to his rights as herein set forth and alleged. And may it please your Honors to grant unto your orator a writ of subpoena, issued out of and under the seal of this Court, directed to the said complainant in said bill of complaint and your orator's codefendants men-

tioned therein, commanding them by a certain day and under the penalty prescribed by law to be and appear in this Honorable Court, and there and then to answer to the premises, but not under oath, an answer under oath being hereby expressly waived, and to stand to and abide such order and decree as may be made against them, and for costs of suit, and your orator prays for such further relief as to this Honorable Court may seem meet and equitable.

And your orator will ever pray.

MASSENA BULLARD,

Solicitor for the Defendant, and Cross-complainant,
R. S. Hale.

United States of America,
State and District of Montana,
County of Lewis and Clarke,—ss.

On this fourteenth day of July, A. D. 1903, before me, a Notary Public in and for Lewis and Clarke County, Montana, personally [31] appeared R. S. Hale, who being by me duly sworn, deposes and says: That he is one of the defendants in the above-entitled case, and the complainant in the foregoing cross-bill; that he has read the foregoing cross-bill, and knows the contents thereof, and that the same is true, except as to the matters and facts therein stated on information and belief, and as to such matters he believes it to be true.

R. S. HALE.

Subscribed and sworn to before me this fourteenth day of July, A. D. 1903.

MASSENA BULLARD,

Notary Public in and for Lewis and Clarke County,
State of Montana.

Service of the foregoing cross-bill accepted and copy received this fourteenth day of July, 1903.

McCONNELL & McCONNELL,
Solicitors for Complainant, Ames Realty Company.
[32]

[Endorsed]: No. 668. Ames Realty Company, a Corporation, Complainant, vs. Big Indian Mining Company, a Corporation, R. S. Hale et al., Defendants. Cross-bill of Complaint in Equity of R. S. Hale. Filed July 15th, 1903. Geo. W. Sproule, Clerk. Massena Bullard, Attorney for Cross-complainant, Helena, Montana. [33]

And thereafter, on August 28, 1907, statement as to title to lands of defendant Robert S. Hale was duly filed herein, being in words and figures as follows, to wit: [34]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY et al.,
Defendants.

Statement as to Title to Lands of Defendant, Robert S. Hale.

The defendant, Robert S. Hale, makes the following statement as to the title to lands owned by him and embraced in the above-entitled action;

The said defendant, Robert S. Hale, is the owner

and he and his grantors and predecessors in interest have for more than thirty-two years owned the lands mentioned and referred to in this defendant's cross-bill of complaint on file herein, which lands are situated in Jefferson County and in Lewis and Clark County, State of Montana, and are particularly described as follows, to wit:

In Lewis and Clark County:

Survey number 843, containing twelve (12) acres.

$\frac{2}{3}$ of Lot 45, Survey number 407, containing thirty (30) acres.

Part of Lots 54 and 98, Survey number 1514, containing twenty (20) acres.

Survey number 444, containing thirty-three and fifty one-hundredths (33.50) acres.

Mineral Entry, number 2354, containing eighty-eight and fifty one-hundredths (88.50) acres.

Survey number 767, containing sixty-two and twenty-six one-hundredths (62.26) acres.

Survey number 101, containing sixteen and twenty-six one-hundredths (16.26) acres.

Survey number 442, containing thirty-nine and forty-seven one-hundredths (39.47) acres.

Survey number 388, containing eleven and seventeen one-hundredths (11.17) acres. [35]

Survey number 30, containing eight and twenty-one one-hundredths (8.21) acres.

Survey number 2626, containing twenty (20) acres.

Part of Survey number 880, containing fifty-six (56) acres.

All of the foregoing lands are in township number nine, north of range number four west.

In Jefferson County:

Lot eight, Survey number 752, containing ninety-five and eighty-eight one-hundredths (95.88) acres, in township number eight, north, of range number four west.

That this defendant, his grantors and predecessors in interest have for more than thirty-two years last past continuously occupied, used and enjoyed said mining claims, and have used for the purpose of working, operating and mining said property, the waters conveyed by the Park Ditch mentioned and referred to in this defendant's said cross-bill of complaint, and that this defendant is now using said waters.

MASSENA BULLARD,

Solicitor for Defendant Robert S. Hale.

[Indorsed]: Title of Court and Cause. Statement as to Title to Lands of Defendant Robert S. Hale. Filed Aug. 28, 1907. Geo. W. Sproule, Clerk. [36]

And thereafter, on April 14, 1908, a stipulation as to testimony was duly filed herein, which is in the words and figures following, to wit: [37]

[Stipulation as to Testimony.]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, Helena & Livingston Smelting and Reduction Company, a Corporation, Helena Land and Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Anotne Semenech, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead,

Lind Warneck, Kate Cassidy, C. W. Jensen, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris. Robertson, Chris. Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clarke, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield,

Defendants. [38]

It is hereby stipulated and agreed between the parties to the above-entitled action as follows:

1. That said action may be tried to the Court without a jury, the parties hereby expressly waiving a jury in said action, and that the testimony in said action may be taken before H. A. Van Horn, a commissioner hereby appointed for the purpose of taking said testimony. That said commissioner shall have power to administer oaths, and after reducing the testimony to writing, the whole of said testimony shall, on or before the first day of June, 1907, be submitted to the Judge of said court for findings of fact and conclusions of law.

2. That the complainant may have thirty days

from the first day of February, 1907, within which to take its testimony in said action, and the defendants and intervenors may have until the first day of June, 1907, within which to take their testimony. Provided, that the time herein provided may be extended by the Court for good cause.

3. The following shall be taken and held to be facts in said action without the necessity of introducing any proof with reference thereto, and shall be considered of the same effect as if conclusively established by competent and sufficient testimony:

a. That each party corporation is a corporation duly incorporated as alleged in the pleading of such party.

b. That the title to the lands of the several parties, complainant and defendants, shall be and is conceded to be as set out in the bill of complaint or answer, or cross-complaint, or complaint in intervention, as the case may be, of the respective parties, unless proof of title shall be required as hereinafter provided.

c. That the lands of the respective parties are dry and arid and require artificial irrigation for their successful [39] production of agricultural crops thereon; that those owning placer mines require water for the operation of the same.

4. Each allegation in each answer, cross-complaint or complaint in intervention, except as herein otherwise admitted, shall be deemed to be denied in all respects as fully and with like effect as if a replication or answer thereto had been filed, and it shall therefore be unnecessary for any party to the action to file a replication to any answer of any party, or in

answer to his cross-complaint, or complaint in intervention.

5. Any party may, if he thinks proper, file a written statement as to the title to his lands, or an abstract of title to his property, and such statement or abstract of title, or the allegations in the pleadings of such party to his title and description of his lands shall be taken as correctly describing the lands of such party and his title thereto, unless controverted by some other party after due notice. If controverted, demand in writing shall be made upon the party to present proof relative to his title or the description of his property, or both, and such demand shall be served upon such party or his attorney at least three days before he shall be required to offer testimony in response to such demand.

Dated January 22, 1907.

McCONNELL & McCONNELL,

Solicitors for Complainant.

EDWARD HORSKY,

Solicitor for Certain Defendants.

H. S. HEPNER,

Solicitor for Certain Defendants.

ALBERT J. GALEN and GALEN &

METTLER,

Solicitors for Certain Defendants. [40]

C. A. SPAULDING,

Solicitor for Defendant Strobel.

A. P. HEYWOOD,

Solicitor for Certain Defendants.

H. G. & S. H. McINTIRE,

Solicitor for Certain Defendants.

A. K. BARBOUR,

Solicitor for Certain Defendants, Helena & Livingston S. & R. Co.

CARL RASCH,

Solicitor for Certain Defendants.

LEON A. LA CROIX,

Solicitor for Certain Defendants.

T. J. WALSH,

Solicitor for Certain Defendants.

M. S. GUNN,

Solicitor for Certain Defendants.

MASSENA BULLARD,

Solicitor for Certain Defendants.

ALBERT I. LOEB,

Solicitor for Certain Defendants.

D. M. KELLY,

Solicitor for Christ Olsen.

W. D. TIPTON,

Solicitor for Interveners D. A. G. Flowerree et al.

[Indorsed]: Title of Court and Cause. Stipulation for Taking Testimony as to Pleadings and as to Admitted Facts. Filed April 14, 1908. Geo. W. Sproule, Clerk. [41]

That on October 16, 1903, the Depositions of Patrick Woods and D. A. G. Flowerree were duly filed herein, being in the words and figures following, to wit: [42]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation,
R. S. HALE et al.,
Defendants.

Stipulation [Re Depositions of D. A. G. Flowerree and Patrick Woods].

It is hereby stipulated and agreed that the depositions of D. A. G. Flowerree and Patrick Woods, witnesses of defendant, R. S. Hale, in the above-entitled action, may be taken at the law office of Massena Bullard, Room 8, Gold Block, Helena, Montana, before any notary public in and for Lewis and Clarke County, Montana, on Tuesday, September 8, 1903, commencing at the hour of ten o'clock A. M. of said day, and if not completed on that day may be continued from day to day and over Sundays until completed, and that when so taken the same may be read in evidence on the trial of said cause, it being expressly stipulated that notice of the taking of said depositions is hereby waived, and said depositions may be taken in all respects the same and with like effect as if due and regular notice had been given and served, reserving the right to all parties to object

to any and all questions and answers at the time of the trial of said action the same as if said parties were present in court and testifying.

Dated September 3, 1903.

McCONNELL & McCONNELL,
Attorneys for Complainant.

ASHBURN K. BARBOUR,
Atty. for Helena & Livingston Smelting & Reduction Company.

EDWARD HORSKY,
Atty. for Defendants Chris Wickersheim, Jas. Mulholland, and Geo. Thies.

SHOBER & RASCH,
Solicitors for About 16 Defendants.

H. S. HEPNER,
Solicitor for Defts. H. M. Hill, Chas. B. Zastrow and L. Wonderer.

M. S. GUNN,
Atty. for Certain Defendants.

A. P. HEYWOOD,

C. A. SPAULDING,

Attys. for Robert Strobel.

NOLAN & LOEB.

LEON A. LACROIX. [43]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation
et al.,

Defendants.

Deposition of Patrick Woods.

BE IT REMEMBERED: That pursuant to the stipulation hereunto annexed, and on the eight day of September, A. D. 1903, at ten o'clock A. M. of said day, at the office of Massena Bullard, Room 8, Gold Block, in the city of Helena, Lewis and Clarke County, State of Montana, before me, J. Miller Smith, a notary public in and for said county of Lewis and Clarke, duly appointed and commissioned to administer oaths, etc., personally appeared PATRICK WOODS, a witness produced on behalf of the defendant, R. S. Hale, in the above-entitled action, now pending in the said court, who being first by me duly sworn, was then and there examined and interrogated by Massena Bullard, Esq., of counsel for the defendant, R. S. Hale, and by Odell W. McConnell, Esq., of counsel for the said complainant, and testified as follows:

Question. State your name, age, place of residence and occupation.

Answer. My name is Patrick Woods. Age is eighty-three. Farmer. My residence is now Hardy, Montana.

Question. How long have you resided in what is now the State of Montana?

Answer. Since the fall of 1864.

Question. You may state whether you at any time resided in the Prickly Pear Valley in Lewis and Clarke County, Montana, and if so, when?

Answer. I settled in Prickly Pear Valley in the first of April, 1865, and remained there until about

(Deposition of Patrick Woods.)

'69. I then moved to Missouri [44] River Valley. I think in 1870 I came back to Prickly Pear Valley and resided near the old place that I first settled, and bought out the Rexford ranch.

Question. Is the Rexford ranch what was subsequently known as the Stuart ranch?

Answer. Yes, sir.

Question. Please state whether you were acquainted at any time with A. M. Woolfolk, John H. Ming, John Kinna, D. A. G. Flowerree, T. A. Ray and W. L. Steele.

Answer. Acquainted with all of them.

Question. How long have you known them?

Answer. I've known them since 1865 or '6, or about all of them since I came to the country.

Question. State whether you were acquainted with all of the parties I have named during the years 1869, 1870, 1871 and 1872.

Answer. Yes, sir.

Question. State whether during the years that I have named you were acquainted with what is known as Lump Gulch in Jefferson County, Montana.

Answer. Yes, sir.

Question. State whether during the years above named you were acquainted with what is known as the Park Ditch enterprise.

Answer. I was.

Question. Who was particularly connected with that enterprise?

Answer. Well, I do not know that I can mention all of them, but Mr. Woolfolk was one. There was

(Deposition of Patrick Woods.)

a stream, I think, was the Park Ditch, by its waters. My understanding is that they were the headwaters of Lump Gulch, but there was a lake up there, or reservoir.

Question. State whether during the years I have named you were acquainted with any of the water rights of Prickly Pear Creek in Jefferson County.

Answer. Well, I presume I was acquainted with them. I was [45] there and was farming and of course we all knew who had water rights.

Question. State whether at any time during the years I have named you recall any transactions relative to the waters of Lump Gulch and the Park Ditch.

Counsel for the complainant objects to the witness testifying relative to any matters which were reduced to writing unless a copy of the writing is produced.

Mr. McCONNELL (Continuing).—For the reason that it would not be the best evidence, the written instrument itself being the best evidence of the matter about which the witness is asked to testify.

Answer. Yes, sir, I did.

Question. State in your own language and to the best of your memory what these transactions were and how they arose.

Counsel for the complainant interposes the same objection as to the previous question.

Answer. Well, my recollection about that is that Woolfolk came to me and said they wanted to secure from the ranchers in the valley their promise to let the Park Ditch have the use of that water up at the

(Deposition of Patrick Woods.)

head of Lump Gulch and its tributaries, and that we turned out and canvassed the valley and got the consent of the ranchmen that then had water rights, that they would waive their priority for the benefit of the ditch. At that time we was in very *straight* circumstances and we got everyone we could that was willing to do anything to encourage any enterprise that looked like it would produce any good effect for the farmers. They consented they would give the use of the water.

COUNSEL FOR THE COMPLAINANT.—We object and move to strike it out, for the reason that it is hearsay and that it is irrelevant, incompetent and immaterial.

Mr. BULLARD (Continuing).—What have you to say as to whether the prior appropriators of the Prickly Pear Valley did at that time or not consent to that arrangement and waive their prior rights?

Question by Mr. McCONNELL, Counsel for Complainant.—Was there a written instrument signed by the parties? [46]

Answer. I think there was.

Counsel for complainant objects to any further examination upon this matter until the written instrument alleged to have been signed is produced, inasmuch as that is the best evidence that all water rights were given to the defendant, R. S. Hale, effecting these water rights.

(Mr. BULLARD Continuing:)

Answer. Yes, sir, I think they all consented to it.

Question. If you can remember the names of

(Deposition of Patrick Woods.)

any of these appropriators, who, to your knowledge, did consent in writing to the arrangement you have mentioned, please give the names as far as you can.

Answer. Well, I don't know that I can recall all of them but I know the names. There is James Fergus, Shelton Duff, James Anthony, Thomas Thorp, Harry Neafus, W. L. Millegan, and there may be some others that I can't recall. I can't recall them all.

Question. What have you to say with reference to the owner of the appropriator subsequently known as the Dallas ranch?

Answer. Well, that was formerly belonging to my son in laws, Neafus.

Question. What action did you take as to your right at that time?

Answer. I yielded to the demand, and Mr. Bywaters and it appears to me like there was some person else by the creek also that lived on the adjoining ranch. I forgot who occupied it then. I forgot the name now. I know I never heard any dissatisfied voice from any of them, but it appeared to be that every one was willing to sign the paper.

Question. Do you remember as to the owner of what was known as the Jones ranch and the Bywaters ranch?

Answer. They all participated in this agreement. Yes, sir.

Cross-examination by O. W. McCONNELL, Esq.,
for Complainant.

Question. You say, Mr. Woods, that this consent

(Deposition of Patrick Woods.)

was in writing?

Answer. Yes, sir. That is my recollection. There was a paper taken around.

Question. Can you give us the substance of this writing?

Answer. Oh, I could not, Mr. McConnell. It was just that they [47] gave their consent in writing that the Park Ditch, as it was then called, was to have the right to use water for the purpose of mining.

Question. Is it not a fact, Mr. Woods, that it was represented to the ranchers that the Park Ditch would store the water in a reservoir and would thereby furnish more water to the ranchers by storing it in a reservoir, and that it would not in any way interfere with the use of the water by the ranchers, but would let it come down the Hale Gulch?

Answer. Well, Mr. McConnell, I could not state how that instrument was drawn. It's *to* long ago. I could not give you a sensible answer to that at all.

Question. There was no consideration *based* to you and so far as you know to the others?

Answer. I think not to any of them. I never heard of any.

Question. You would not have voluntarily given away any of your rights to the use of the water under and of the value of it in the valley, would you?

Answer. Well, I tell you how I felt at that time. I was willing to do almost anything that would help the farmers to dispose of what they could raise.

Question. You did not think you were giving away any of your water rights?

(Deposition of Patrick Woods.)

Answer. I did not know as we were giving away our water rights in that way.

Question. And you did not expect it to interfere in any way with your water rights?

Answer. I did not know at that time what was best. Yes, sir.

Question. Was there plenty of water?

Answer. There was not very many water rights and people did not think there ever would be. That's about the way we looked at it.

Question. You all had plenty of water up to that time?

Answer. Yes, sir. I was one of the appropriators and at that time, Mr. McConnell, there were very few ditches. In fact, I *do*dn't think but one or two were taken out above the head of our ditch. There was [48] six or seven of us that took out the water in what we called the company ditch. We never had any trouble about water at that time.

Question. Where did the water from Lump Gulch and the Park Ditch come into the Prickly Pear?

Answer. It may have been at different places. Some mining was done on Clark Creek, some was done on Holmes Gulch and some on Big Indian, and the water came down this gulch. I never went araound to look at it.

Question. Is it not a fact, Mr. Woods, that after you signed this agreement the water of Lump Gulch continued to flow down to the Prickly Pear Creek?

Answer. Mr. McConnell, I answered that ques-

(Deposition of Patrick Woods.)

tion. I never had occasion to go up above the head of our ditches to see whether the water was coming from Lump Gulch or not.

PATRICK WOODS.

Subscribed and sworn to before me this eighth day of September, 1903.

[Notarial Seal] J. MILLER SMITH,
Notary Public in and for Lewis and Clarke County,
State of Montana.

BE IT REMEMBERED: That by agreement of the parties the further taking of depositions under said stipulation is continued until the tenth day of October, 1903, then to be continued at the same place and at ten o'clock A. M. of said day, at which time it is agreed that the deposition of D. A. G. Flowerree, named in said stipulation, may be taken.

Dated September 8, 1903.

[Notarial Seal] J. MILLER SMITH,
Notary Public in and for Lewis and Clarke County,
State of Montana.

BE IT REMEMBERED: That by agreement of the parties the further [49] taking of depositions under said stipulation is continued until the thirteenth day of October, 1903, then to be continued at the same place at two o'clock P. M. of said day, at which time it is agreed that the deposition of D. A. G. Flowerree may be taken.

Dated October 10, 1903.

[Notarial Seal] J. MILLER SMITH,
Notary Public in and for Lewis and Clarke County,
State of Montana.

Deposition of D. A. G. Flowerree.

BE IT REMEMBERED: That on the thirteenth day of October, 1903, at two o'clock P. M. of said day, and at the law office of Massena Bullard, Room 8, Gold Block, Helena, Montana, the taking of depositions under the foregoing stipulation was resumed pursuant to agreement, and thereupon personally appeared D. A. G. FLOWERREE, a witness produced on behalf of the defendant, R. S. Hale, in the above-entitled action, now pending in said court, who being first by me duly sworn, was then and there examined and interrogated by Massena Bullard, Esq., of counsel for the defendant, R. S. Hale, and by Odell W. McConnell, of counsel for the said complainant, and testified as follows:

Question. State your name, age, place of residence and occupation.

Answer. Well, I was born in 1835, Ralls County, Missouri. My name is D. A. G. Flowerree. I reside at Helena, Montana. Stock-grower.

Question. How long have you resided in what is now the State of Montana?

Answer. Since the sixteenth day of March, '64.

Question. State whether at any time you resided in the Prickly Pear Valley in Lewis and Clarke County, Montana, and if so when.

Answer. I never lived in there; I lived in Helena.

Question. State if at any time you were interested in any property in Prickly Pear Valley; and if so how long have you been interested in it

Answer. Yes, sir. I have had it in my possession, since '65, I think. [50]

(Deposition of D. A. G. Flowerree.)

Question. State whether you were acquainted at any time with A. M. Woolfolk, John H. Ming, John Kinna, Thomas A. Ray and William Steele.

Answer. I am, with all of them.

Question. How long have you known these gentlemen?

Answer. I have known them since I was connected with them in '67. Along about '69 or '70, the latter part.

Question. State whether or not you were acquainted with all the parties I have named during the years 1869, 1870, 1871, and 1872.

Answer. Yes. I was acquainted with all of them during all those years.

Question. State whether during the years I have named you were acquainted with what was known as Lump Gulch in Jefferson County, Montana.

Answer. I was.

Question. State whether during those years you were acquainted with what is known as Park Ditch enterprise.

Answer. I was.

Question. Who was particularly connected with this enterprise?

Answer. Well, there was Jesse Taylor, John Ming, Tom Ray, Sam Hauser, Colonel Woolfolk, John Kinna, R. S. Hale and myself.

Question. Describe as fully as you can remember the Park Ditch as to the waters it tapped and the country it covered?

Answer. Well, I have not been there, since I got

(Deposition of D. A. G. Flowerree.)

loose from it. It is taken from Lump Gulch, brought a distance into a lake. It was a natural lake, I think, and the ditch went from there to the head of the Park Basin.

Question. State whether during the years I have named you were acquainted with any of the water rights of Prickly Pear Creek in Jefferson County and Lewis and Clarke County.

Answer. Yes, I was acquainted with the water rights in Lewis and Clarke County. Not all of them, but many of them.

Question. State whether at any time during the years I have [51] named you recall any transactions relative to the waters of Lump Gulch and the Park Ditch and the rights of the parties having irrigating ditches below there.

By Mr. McCONNELL.—Were the transactions relative to the Lump Gulch and the Park Ditch, which counsel has asked you, in writing?

Answer. To the best of my knowledge, there was.

Counsel for the complainant objects to any testimony regarding the written instrument for the reason that the written instrument itself is the best evidence of its contents and any testimony given by this witness would be hearsay and irrelevant, incompetent and immaterial.

Mr. BULLARD (Continuing).—You may state whether you know where that paper now is.

Answer. I have no idea in the world where it is.

Question. Have you ever seen it since that time?

Answer. It was turned over to Doc. Steele and

(Deposition of D. A. G. Flowerree.)

Jim Caldwell, a partner of mine, who had a ranch. What they did with it, I don't know. I don't know as ever I saw it afterwards. James Fergus signed it, and the paper was turned over to Doc. Steele and Caldwell.

Question. What was the purport of that paper? Give its terms as you can remember it.

Counsel for the complainant objects on the same grounds as interposed above.

Answer. I very distinctly remember that part of it, and the conditions of the country existing at that time. That we give all of the rights that we possessed in Lump Gulch to the Park Ditch Company. That we give all the water rights that we possess in the waters of Lump Gulch to the Park Ditch, and the tributaries of Lump Gulch.

Question. What was the consideration for that relinquishment?

COUNSEL FOR THE COMPLAINANT.—To that we object as presuming the consideration, and that it is in evidence that no consideration whatever existed.

Mr. BULLARD (Continuing).—What, if any, consideration was there for the relinquishment of the rights you have mentioned?

Answer. Why that these waters would be brought into the Park [52] Ditch and to the head of Dry Gulch and those mines would be worked and give employment for men.

Question. What have you to say as to whether you relinquished your right also at that time?

(Deposition of D. A. G. Flowerree.)

Answer. I did. I talked with every man there was in the valley. There was one man kicked a little while, but he signed, but I think all of them made the agreement. Another man, I don't remember his name, first objected, but afterward signed.

Question. I will be glad if you can recall some of the names of the farmers that you talked with and who informed you that they had made this arrangement?

COUNSEL FOR THE COMPLAINANT.—To that we object, for the reason that the best evidence of that would be the paper itself signed by the parties and for the reason that Mr. Flowerree testified that he only saw and knew of his personal knowledge of one man signing it, being James Fergus, and the other being hearsay.

Answer. Why, here's Doc. Steele. There's old man Woods, and Bywaters, Woods' son in laws, Thomas Thorp and Harry Neafus, old man John Jones. Shelton Duff was in favor of it. Anthony, Mr. Woods talked to him.

Mr. BULLARD (Continuing).—State what you know with reference to the owners of water in Lump Gulch below the head of the Park Ditch or above it.

Answer. Well, I could not, one of these men's names. Well, I knew them, that is all, I think about *the*. I can tell you what they said to us at that time. There was two parties that went down with them. There was only one man that I was well acquainted with at that time. I didn't know his name; and the other ones, well, I knew them by sight. I talked to

(Deposition of D. A. G. Flowerree.)

Jim Ax. I says to him, "What are you doing here, any good?" He says, "No, I am not. I am going to work up to a certain place." He says, "If I strike nothing, I'll get out of here," and I talked with him a while and never said anything to him about locating water. I went on up the gulch and saw Jim Ax. "Say, what are you doing,—any good?" He says, [53] "No, I am not," and he says, "I am going to work here a few weeks longer before I am going to get out. I don't think there is anything in here," something like that, and that's all I know about it. Afterwards I knew they had litigation and were bought out.

Cross-examination by O. W. McCONNELL, Esq., for
Complainant.

Question. The waters of Lump Gulch are tributary to Prickly Pear, are they not?

Answer. That's right.

Question. And you people, and the others living in the Prickly Pear Valley, had appropriated water from the Prickly Pear Creek and in consequence of that you had appropriated water from Lump Gulch?

Answer. Yes, that's right.

Question. You had plenty of water at that time, in '69, '70 and '71, did you not?

Answer. I think we did.

Question. If you desired to help the Park Ditch enterprise you did not consider that you were giving away any of your water rights?

Answer. I did; all that was in Lump Gulch.

Question. Did you personally receive any con-

(Deposition of D. A. G. Flowerree.)

sideration for that?

Answer. Well, I was one of the members.

Question. You were one of the Park Ditch Company?

Answer. The Park Ditch Company and I was a promoter. There was about five of us on the same way. We offered \$500.00 apiece. Well, there was Tom Ray offered \$500.00, Jesse Taylor offered \$500.00, and I offered \$500.00 to start.

Question. Start what?

Answer. This ditch, the Park Ditch Company, to permit them to bring the Park Ditch and bring the waters in, but there was us three, I know, and we had a talk, us three, about it. Now, we heard this Park Ditch was about to fall through and we had to stand in. They wouldn't take the \$500.00. Some of them got warmed up. We went to work and surveyed and we got it started. Mr. Hale was a little warmed himself. We had a man here that had plenty of money, Mr. Woolfolk, a lawyer, [54] and he got warmed up. I went into Hale's Drug Store. I had paid \$200.00, my first assessment. They made another call. This was for surveying purposes, preliminary. Hale said, "If you will pay up the assessment, I'll take it off your hands." \$350.00, it was. I paid it. I quit it for \$350.00 loser.

Question. Now, when was that, Mr. Flowerree?

Answer. That was within a month after that time.

Question. Was that before or after the agreement was signed?

Answer. Afterwards.

(Deposition of D. A. G. Flowerree.)

Question. At the time the agreement was made and you signed the agreement, were you connected with the Park Ditch Company?

Answer. Yes, sir.

Question. As a matter of fact, Mr. Flowerree, there was no consideration at all passed to you for giving this up, but, on the contrary, you paid out money yourself?

Answer. Yes. I was producing crops out on the valley. There was three years, and the first year I had one thousand bushels of potatoes, and another year fifteen hundred bushels, that I had to give away, because I had no market for them.

Question. Potatoes were a drug on the market, then?

Answer. We had no people here, and people were leaving the country and it was a ground hog case. We wanted to increase the population and we thought the ditch would give employment to miners and make a market for our crops.

Question. It would enable you to sell potatoes?

Answer. Everything. There's was hundreds of miners working round in two years and up in the Park Ditch.

Question. Well, Mr. Flowerree, did you discontinue in any regard the use of the water for the subsequent years after that, or did you continue to use water from Prickly Pear just as you had done before?

Answer. Yes, sir.

Question. The signing of this agreement, then,

(Deposition of D. A. G. Flowerree.)

did not in any way at all cause you to give up the use of the water?

Answer. No, sir. [55]

Question. Well, is it *not* a fact, Mr. Flowerree, that you represented to the ranchers in the valley, who signed this agreement, that it would be a benefit to the ranchers and to the users of water for the reason that the Park Ditch Company would store the waters in reservoir and would thereby furnish more water to the ranchers?

Answer. No.

Question. Is it *not* a fact that it was represented to the ranchers that the signing of this instrument would not in any way interfere with the use of water upon ranches as they had heretofore used it?

Answer. Except Lump Gulch, yes, sir.

Question. Well, what about the water they were using out of Prickly Pear Creek?

Answer. Yes, and we signed our rights to the waters of Lump Gulch that flowed from Lump Gulch with the distinct understanding that we gave it to the Park Ditch to build this ditch.

Question. You did not feel that you were actually parting with anything in signing that paper, did you, you had plenty of water?

Answer. We did.

Question. I suppose the ranchers that had claims appropriated water individually?

Answer. Yes, to the best of my knowledge.

Question. Well, you did not expect that in doing so, it would in any way interfere with the use of water

(Deposition of D. A. G. Flowerree.)

from Prickly Pear Creek?

Answer. We signed the rights of Lump Gulch.

Question. Did you expect it would interfere with Prickly Pear Creek?

Answer. It did not.

Question. Where was this mining of the Park Ditch Company to be conducted?

Answer. Well, it was to take the water anywhere they wanted to.

Question. Did you desire to get the Park Ditch to operate certain mines?

Answer. We were working these mines in Dry Gulch, Holmes [56] Gulch and a number of other gulches.

Question. There is Clark's Gulch and Holmes' Gulch?

Answer. Yes, sir.

Question. Well, is it not a fact, Mr. Flowerree, that after the water had been used by the Park Ditch Company for mining purposes it would flow down on Holmes Gulch and come on down the Prickly Pear Creek?

Answer. Yes, sir. That's right.

Question. You could not quote to us the wording of that written instrument, could you?

Answer. No. I think it is, that is, I'll give what I can, that we give the Park Ditch Company the right to use the waters of Lump Gulch, and I don't know for certain whether it specified the place to take it out or not.

(Deposition of D. A. G. Flowerree.)

Question. Did it state for what they were to use it?

Answer. Yes, for mining purposes, and other grounds; placer mines, it was.

Question. Your object in that was to put men to work on the mines, but that it would not diminish the flow of your water and the water your company used would come down Holmes Gulch and come back into the Prickly Pear Creek?

Answer. There was nothing of that kind specified.

Question. But was not that your understanding?

Answer. There was an understanding that we gave them the water for mining purposes.

Question. After they were through with it you expected them to allow it to flow back into the stream?

Answer. We wanted to use it for our crops.

Question. Well, it is a fact, Mr. Flowerree, that after you signed this agreement for the waters for Park Ditch the waters continued to flow down and come into the Prickly Pear Creek?

Answer. Well, now, to tell you the truth, that I could not swear to at all. Of course I've never been on Lump Gulch since that time. I have probably been there hunting, but I never paid no attention to it as to where the waters did come. The waters were used in a number [57] of gulches round here. How far they were taken I don't know.

Question. The only person that you can testify as to your personal knowledge that signed this paper

(Deposition of D. A. G. Flowerree.)

was the one you saw sign it, Mr. James Fergus?

Answer. That's all, and Mr. Woods. We left it with Doc. Steele and Jim Caldwell.

D. A. G. FLOWERREE.

Subscribed and sworn to before me this thirteenth day of October, 1903.

[Notarial Seal]

J. MILLER SMITH,

Notary Public in and for Lewis and Clarke County,
State of Montana.

State of Montana,

County of Lewis and Clarke,—ss.

I, J. Miller Smith, a Notary Public in and for said Lewis and Clarke County, do hereby certify that the witnesses Patrick Woods and D. A. G. Flowerree, in the foregoing depositions named, were by me severally, duly sworn to testify the truth, the whole truth and nothing but the truth in said cause; that said depositions were taken at the time and place mentioned in the annexed stipulation, to wit, at the law office of Massena Bullard, Room 8, Gold Block, Helena, Montana, commencing at ten o'clock A. M. on Tuesday, the eighth day of September, 1903, and that the taking thereof was continued from time to time and by the consent and agreement of the parties appearing until the thirteenth day of October, 1903, on which day the taking of said depositions was concluded; that said depositions were reduced to writing by me and when completed the deposition of each witness was by me carefully read to said witness and by him corrected, and was by him subscribed in my presence.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office, this thirteenth day of October, 1903.

[Notarial Seal] J. MILLER SMITH,
Notary Public in and for Lewis and Clarke County,
State of Montana. [58]

[Endorsed]: No. 668. Ames Realty Company, a Corporation, Complainant, vs. Big Indian Mining Company, a Corporation et al., Defendants. Deposition. Notary's Fees, \$7.00. J. Miller Smith, Notary Public. Filed Oct. 16, 1903. Geo. W. Sproule, Clerk. Massena Bullard, Attorney for R. S. Hale, Defendant, Helena, Montana. [59]

That on the 31st day of December, 1908, the Deposition of W. L. Steele was duly filed herein, being in the words and figures following, to wit:
[60]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation,
R. S. HALE et al.,
Defendants.

Stipulation [Re Deposition of W. L. Steele].

It is hereby stipulated and agreed that the deposition of W. L. Steele, witness of the defendant, R. S. Hale, in the above-entitled action, may be taken at the law office of Massena Bullard, Room 8, Gold Block, Helena, Montana, before any notary public

in and for Lewis and Clark County, Montana, on Saturday, April 23, 1904, commencing at the hour of two o'clock P. M. of said day, and if not completed on that day may be continued from day to day and over Sunday until completed, and that when so taken the same may be read in evidence on the trial of said cause, it being expressly stipulated that notice of the taking of said deposition is hereby waived, and said deposition may be taken in all respects the same and with like effect as if due and regular notice had been given and served, reserving the right to all parties to object to any and all questions and answers at the time of the trial of said action, the same as if said parties were present in court and testifying.

Dated April 21, A. D. 1904.

McCONNELL & McCONNELL,
Attorneys for Complainant.

H. S. HEPNER,
Attorney for Defendant Zastrow et al.

C. A. SPAULDING,
Atty. for Deft. Robert Strobel.

H. G. & S. H. McINTIRE,
Attys. Big Indian Mng. Co.

NOLAN & LOEB,
Attys. for Reynold Prosser.

SHOBER & RASCH,
Solicitors for 16 Defendants.

A. P. HEYWOOD,

M. S. GUNN,

A. K. BARBOUR,

Atty. for Helena & Livingston S. & R. Co.

LEON A. LaCROIX,

For Hall, Parke and Clegg. [61]

*In the Circuit Court of the United States, Ninth
Circuit, District of Montana.*

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation,
R. S. HALE et al.,
Defendants.

Deposition of W. L. Steele.

BE IT REMEMBERED: That, pursuant to the stipulation hereunto annexed, and on the twenty-third day of April, A. D. 1904, at two o'clock P. M. of said day, at the law office of Massena Bullard, Room 8, Gold Block, in the City of Helena, Lewis and Clark County, State of Montana, before me, Richard Lockey, Jr., a notary public in and for said County of Lewis and Clark, duly appointed and commissioned to administer oaths, etc., personally appeared W. L. STEELE, a witness produced on behalf of the defendant, R. S. Hale, in the above-entitled action, now pending in the said court, who being first by me duly sworn, was then and there examined and interrogated by Massena Bullard, Esq., of counsel for the defendant, R. S. Hale, and by Odell W. McConnell, Esq., of counsel for the said complainant, and A. K. Barbour, Esq., of counsel for the defendant, The Helena & Livingston Smelting & Reduction Company, and testified as follows:

Question. State your name, age, place of residence and occupation.

(Deposition of W. L. Steele.)

Answer. William L. Steele; seventy-one years old; Helena, Montana; occupation, physician.

Question. How long have you resided in what is now the State of Montana?

Answer. Since 1863.

Question. You may state whether you at any time resided in the Prickley Pear Vally, in Lewis and Clark County, Montana, and if so when.

Answer. I resided there, let's see, '67, '68, '69, and probably [62] part of '70.

Question. Were you acquainted during those years with A. M. Woolfolk, John H. Ming, John Kinna, D. A. G. Flowerree, T. A. Ray and Patrick Woods?

Answer. I was.

Question. How long have you known those men?

Answer. I have known all of them since 1867.

Question. Were you acquainted with all the men I have named during the years 1869, 1870, 1871, and 1872.

Answer. Yes.

Question. State whether during the years I have named you were acquainted with what is known as Lump Gulch, in Jefferson County, Montana.

Answer. I have been on it as early as '65 and frequently thereafter.

Question. State whether during the years above named you were acquainted with what is known as the Park Ditch enterprise.

Answer. I think I was acquainted about '69, probably. I think it was about that time.

(Deposition of W. L. Steele.)

Question. Who was particularly connected with that enterprise?

Answer. I was connected with that enterprise. John Ming and John Kinna were also interested in it.

Question. State whether during the years I have named you were acquainted with any of the water rights of Prickley Pear Creek in Jefferson County.

Answer. I think I knew them all.

Question. Give the names of as many of them as you can now recall.

Answer. Well, there's Flowerree, Shelton Duff, one of the Fryatt's and Mr. Wilkinson. There was old man Newton right beside him. A little below was John Cave and then coming out from there we come to what we called the Scotty ranch. They went by the name of Scotty and the other was Bob Barnes. There was Jim Smith down in the valley and a little above him old man Gratten. Above him was old man Dean. There was Alexander Burns and above him Bill Reeves. Bill, I think, [63] claimed that he took his water from McClelan Gulch. Them coming on down there some man, I don't believe it was Shaw. He lived on a ranch right opposite where East Helena is. I think old Mrs. Duke owned it, but I am not sure. I think Warfield owned a ranch in there. There was Myron Brown, Harry Neafus, Thomas Thorpe, James Anthony, Patrick Woods, W. L. Millegan, Rexford, and I believe Mr. Bullard's father owned a ranch. That is about all of them. There may be one or two more.

(Deposition of W. L. Steele.)

Question. State whether at any time during the years I have named you recall any transactions relative to the waters of Lump Gulch and the Park Ditch.

Answer. Yes, sir, with the Park Ditch.

Question by Mr. McCONNELL, Counsel for Complainant.—Were the transactions about which Mr. Bullard was asking you relative to the Lump Gulch and the Park Ditch in writing?

Answer. There was.

Counsel for the complainant objects to any testimony in reference to this matter by this witness, for the reason that the written instrument itself is the best evidence of its contents, and any testimony given by this witness would be hearsay, irrelevant, incompetent and immaterial.

Counsel for the defendant, The Helena & Livingston Smelting & Reduction Company, interposes the same objection as above interposed in behalf of the complainant in this action.

Question. Do you know where the written document to which you have referred above is?

Answer. Jim Caldwell and myself gave it to Col. A. M. Woolfolk. That is the last I saw of it or heard of it.

Question. Now, you may answer the question as to whether during the years I have named you recall any transactions relative to the waters of Lump Gulch and the Park Ditch between the owners of the Park Ditch and the farmers in the valley. [64]

Counsel for the complainant and counsel for the

(Deposition of W. L. Steele.)

defendant, the Helena & Livingston Smelting & Reduction Company, interpose the same objection as above.

Answer. Yes.

Question. State in your own language and to the best of your memory what this transaction was and how it arose.

It is stipulated by the respective parties that all testimony in this deposition relative to the written document mentioned by the witness is objected to as incompetent, and defendant, Helena & Livingston Smelting & Reduction Company, as incompetent, for the reason that the written document itself is the best evidence, and also on the ground that it is immaterial, and upon the further ground that the complainant and the other parties to this action had no notice thereof, and this objection shall apply without the necessity of repeating it in the further taking of the testimony.

Question. You may now state in your own language and to the best of your memory what that transaction was and how it arose.

Answer. In the first place, all the mines could get water to be worked. There was no quartz being worked in the country and everything was awfully dull. We farmers couldn't sell a load of vegetables. We had to throw our vegetables away and hay was pretty much the same way. Believing that there was a great deal of ground here that would pay to work if we had water on it, we gladly consented to relinquish all rights we might have to the waters of

(Deposition of W. L. Steele.)

Lump Gulch in favor of the Park Ditch Company. Well, Mr. Flowerree and Patrick Woods came to me with a paper whereby we agreed to relinquish our rights, and they had been around a part of the valley and they requested myself and Jim Caldwell to go the next day and see all the other farmers. We went around and say every man that had water. They all signed that paper relinquishing their rights with the exception of old man Dean. He said he would go up and see Woolfolk himself, personally, and on the next day he would sign it, and every man was keen to signing it that wanted to encourage the building of that ditch. They all felt that something should be done to revive up that country. [65]

Question. Your memory is that all the owners of water rights in Prickly Pear Creek united in signing that document?

Answer. They all signed except Mr. Dean. He said he wouldn't refuse but would sign it the following day.

Question. State as near as you can remember the contents of that paper that was signed by those owners of water rights in Prickly Pear Creek.

Answer. I cannot recall anything more than that we relinquished our right to the use of any right we had obtained in the waters of Lump Gulch. We relinquished it to the Park Ditch Company. I don't mean that I saw all of them. Patrick Woods and Dan Flowerree had already seen a portion of the farmers and had their names signed to it, but it is true that all the farmers signed the agreement either

(Deposition of W. L. Steele.)

for Patrick Woods, Dan Flowerree or for Mr. Caldwell and myself, except Dean.

Cross-examination by ODELL W. McCONNELL,
Esq., for Complainant.

Question. Doctor, you say this consent was in writing?

Answer. Yes, sir, it was.

Question. It was a written instrument?

Answer. Yes.

Question. And you cannot now give us the substance of this written instrument?

Answer. The substance is what I told you, that we relinquished our rights to the Park Ditch Company.

Question. It was a relinquishment of your rights to the Park Ditch Company?

Answer. It was.

Question. Is it not a fact, Doctor, that it was represented to yourself and to the other ranchers that the Park Ditch Company would store the water in a reservoir or otherwise and that by so storing the water, they would really have more water for the ranches than they had had? [66]

Answer. I think not. Nothing was said about storing the water in a reservoir.

Question. Is it not a fact that it represented that the waters of Lump Gulch would be stored in a reservoir for the purpose of use?

Answer. That was the understanding. It was for that purpose.

Question. And that it would not interfere with

(Deposition of W. L. Steele.)

the use of the water by the ranchers by signing this paper?

Answer. Of course, we all understood there would be less water on the ground.

Question. Did you understand or did the ranchers understand that the signing of this paper would not interfere with the water rights of the ranchers in the valley?

Answer. We gave up our water rights that we had to Lump Gulch and Travis Creek.

Question. Was any consideration paid to you for this?

Answer. No, sir.

Question. Do you, as one of the parties who went around to some of the ranchers, know of any consideration being made to them to sign this paper?

Answer. No, sir. We knew it would be a benefit to the country for all the owners of these water rights to relinquish them.

Question. Were they not to be used for mining purposes alone by the Park Ditch Company?

Answer. We gave it up to the Park Ditch Company to build a ditch. There was no consent and nothing said about what should be done with that water, only they expected to build a ditch.

Question. Well, that was the understanding and reason that you gave up your right, for having the country developed and to be used for mining purposes?

Answer. Yes, sir, of course. For mining or milling purposes or any other purpose.

(Deposition of W. L. Steele.)

Question. Doctor, you do not want us to understand that you [67] donated to the Park Ditch Company your water right, or any portion of your water right for the purpose of agricultural, or for selling water to other individuals, or anything of that sort, do you?

Answer. We gave up the water right absolutely for that reservoir. The time that it would take them to mine out that country would benefit us more than the water could have ever benefited us.

Question. There was no consideration other than the benefits that would result to you from the mining?

Answer. We gave it up for any purpose that would benefit the country.

Question. Solely for mining purposes?

Answer. No, we gave it up for any good purpose.

Question. You did not expect that it would interfere with your right to the waters of Prickly Pear Creek, did you?

Answer. No. We were willing that it should be used to develop the country.

Question. And there was plenty of water up to that time for you without this water?

Answer. Let me see. There were a few streams of water occasionally. Some of the little streams would not run into Prickly Pear Creek and in fact I saw the time when we croosed Prickly Pear dry shod right there at Millegan's right down here in Prickly Pear valley.

Question. There was plenty of water to irrigate your crops?

(Deposition of W. L. Steele.)

Answer. Yes.

Question. You did not expect to in any way interfere with your rights and it did not interfere with your rights, did it?

Answer. No. We had water after the signing of this agreement. The Park Ditch Company at that time made use of the water so far as we were concerned.

Question. You had plenty of water without the Lump Gulch water [68] with which to irrigate your crops and the Park Ditch Company may have appropriated the water without this written consent, might they not?

Answer. I expect they could.

Question. Do you know where the water from Lump Gulch empties into the Prickly Pear?

Answer. I think so. I think I know. It is not far from McCauley's place. I always supposed that was where it emptied into the Prickly Pear.

Question. Is it not a fact that after this written instrument was signed the waters of Lump Gulch continued to flow on down into the Prickly Pear Creek?

Answer. I don't know. I suppose it did. I know there was water running below where they diverted it from Lump Gulch.

Question. Did you record this written instrument that you had the parties sign?

Answer. I gave it to Col. Woolfolk and what he done with it I don't know.

Question. Was this written instrument simply a

(Deposition of W. L. Steele.)

consent to let the Park Ditch Company use the waters of Lump Gulch for mining purposes?

Answer. I can't tell what it was.

Question. You cannot now remember the contents of that instrument?

Answer. No. What I considered it was that I donated to that company all my right, title and interest to those waters.

Question. Did any owners accompany you and Mr. Caldwell on your trip?

Answer. James Caldwell did.

Question. Was this instrument sworn to and acknowledged before a notary public at all?

Answer. I don't think it was. I don't know. We requested Woolfolk to take it.

Question. Did you acknowledge it? [69]

Answer. I don't know; I think not.

Question. As you now remember the instrument, it was not entitled to be recorded, and it was not acknowledged, witnessed or certified as required by the law?

Answer. I didn't have it recorded. I don't know.

Question. Did you after you signed this written instrument discontinue the use of the waters of Prickly Pear Creek for the irrigation of your place, or did you continue to irrigate your place from Prickly Pear as you had done previously to signing this instrument?

Answer. Well, personally, I did for one or two years.

Question. In other words, the signing of this in-

(Deposition of W. L. Steele.)

strument did not in any way interfere with the use by you of the waters of Prickly Pear Creek?

Answer. No.

Question. Where were the mines of the Park Ditch Company that this water was to be used upon?

Answer. All around the Park there. In Dry Gulch and Holmes Gulch and they run on down to the head of Nelson Gulch, and then there was Nelson Gulch and between Nelson Gulch, Grizzly Gulch and Oro Fino and as far as Dry Gulch.

Question. The mines that the Park Ditch Company were supposed to work with this water were in Dry Gulch, Holmes Gulch and Clark's Gulch?

Answer. Anything that the water would cover.

Question. Is it not true, Doctor, that after the water was used on these mines that it still flowed down these gulches and came on down the Prickly Pear Creek?

Answer. No, not much of it.

Question. In other words, those gulches were tributary to Prickly Pear, were they not?

Answer. Yes, sir. [70]

Redirect Examination by MASSENA BULLARD,
Attorney for Defendant, R. S. Hale.

Question. In the early season there was an abundance of water in Prickly Pear Creek for the use of the appropriators?

Answer. Yes, sir, as much as was needed.

Question. In the agreement that you and other farmers made relinquishing your rights in Prickly Pear Creek in favor of the Park Ditch Company as

(Deposition of W. L. Steele.)

to the waters of Lump Gulch what, if any, restrictions were placed upon the Park Ditch Company as to the use they should make of the water.

COUNSEL FOR COMPLAINANT and COUNSEL FOR DEFENDANT, The Helena & Livingston Smelting & Reduction Company.—To that we object, as the written instrument itself is the best evidence thereof, and further, that the witness has testified already that he cannot remember the contents of the instrument.

Answer. There was no restrictions.

Redirect Examination by ODELL W. McCONNELL, Attorney for Complainant.

Question. But it is a fact that the relinquishment was given for the purpose of enabling the Park Ditch Company to work certain mines and furnish a market for the farmers of Prickly Pear Valley?

Answer. No, it was relinquished for the purpose of enabling them to build a ditch. They were going to build the ditch because they knew it would help the country and encourage mining. I offered my ranch for a lot up in town. It was no earthly use. The country had to be built up.

WM. L. STEELE.

Subscribed and sworn to before me this twenty-third day of April, 1904.

[Notarial Seal] RICHARD LOCKEY, Jr.,
Notary Public in and for Lewis and Clark County,
State of Montana. [71]

[Endorsed]: Ames Realty Company, a Corporation, Complainant, vs. Big Indian Mining Company,

a Corporation, R. S. Hale et al., Defendants. Deposition of William L. Steele, Witness for Defendant R. S. Hale. Notary's Fees: 30 Folios at .20, 6.00; Certificate, .50—\$6.50. Opened by Order of Court and Filed Dec. 31st, 1908. Geo. W. Sproule, Clerk, By C. R. Garlow, Deputy. Massena Bullard, Attorney for Defendant, R. S. Hale, Helena, Montana.

[72]

That on July 1, 1908, the testimony taken in this cause was duly filed herein, that portion thereof specified in the praecipe for transcript being as follows, to wit: [73]

ROBT. S. HALE RIGHT.

Helena, Montana, June 17, 1907, 10 A. M.

Hearing resumed pursuant to call of attorney for Robt. S. Hale, one of the defendants in this case.

[Testimony of Robert S. Hale, a Defendant, in His Own Behalf.]

ROBERT S. HALE, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. MASSENA BULLARD.)

Q. Please state your name in full.

A. Robert S. Hale.

Q. Where do you reside? A. Helena, Montana.

Q. How long have you resided here?

A. Since 1865, May, 1865.

Q. Are you the Robert S. Hale, who is named as one of the defendants in this action? A. I am.

Q. You may state, Mr. Hale, whether you are a citizen of the United States. A. I am.

(Testimony of Robert S. Hale.)

Q. Are you acquainted with the Park Ditch, a ditch leading from Park Lake in Lump Gulch, Jefferson County, State of Montana, to the Park Mines near Unionville? A. I am.

Q. In Lewis and Clark County, and other mining lands in Lewis and Clark County? A. I am.

Q. How long have you known that ditch?

A. I have known it,—that is, when we first located it?

Q. Yes, sir.

A. The fall of '69, September '69. [74]

Q. Have you been intimately acquainted with the property ever since that time? A. I have.

Q. Do you know where Park Ditch gets its supply of water? A. Yes, sir.

Q. From where? A. Lump Gulch.

Q. In what county? A. Jefferson county.

Q. At what point is that water diverted from Lump Gulch?

A. At a point about half a mile below the lake.

Q. Below Park Lake?

A. Below Park Lake, yes, sir.

Q. By what means is the diversion made?

A. By a ditch.

Q. When was that ditch originally constructed?

A. It was constructed in '70.

Q. Describe the ditch from the point of intersection with the waters of Lump Gulch throughout its course.

A. It is taken on a grade from Lump Gulch around the foot of the mountains crossing the Grizzley

(Testimony of Robert S. Hale.)

divide into Grizzley Gulch.

Q. What is the size of the ditch at the point where it takes the waters from Lump Gulch?

A. It is thirty by forty inches.

Q. Thirty inches wide, do you mean?

A. Thirty inches at the bottom and forty inches on top.

Q. And how deep?

A. About twenty-four inches deep.

Q. What grade? A. Four-tenths of an inch.

Q. Four-tenths of an inch to the rod?

A. Yes, sir. [75]

Q. Are you acquainted with the measurement of water for mining purposes?

A. To a certain extent; I have had some experience.

Q. How long have you been acquainted with water rights and the use of water for mining purposes?

A. Since 1871.

Q. In what business have you been engaged during those years to the present time?

A. I have been engaged in various businesses.

Q. Have you been engaged in the business of mining during this period? A. Yes, sir.

Q. From what time? A. Since '76.

Q. Continuously? A. Continuously, yes, sir.

Q. What amount of water will the Park Ditch carry from Lump Gulch throughout its course?

A. It should carry 500 inches.

Q. Will it carry that much?

A. Not at present; it is badly filled up with sand and stuff.

(Testimony of Robert S. Hale.)

Q. How much will it carry now?

A. About 400 inches of water; that is a general average; there are places in that ditch that will carry 1,000 inches.

Q. But it is safe to say it will carry 400 inches of water? A. Yes, sir.

Q. What is the length of that ditch?

A. Thirteen miles.

Q. From Lump Gulch to what point?

A. To Grizzly divide.

Q. Does it end in Grizzley divide, or does it come on down? [76]

A. It returns to Grizzley Gulch, follows the gulch on down.

Q. Does the bed of the gulch form a continuation of the ditch?

A. It is the natural channel of the gulch.

Q. The waters of the ditch are then taken into—

A. Into the head of the natural channel of Grizzley Gulch.

Q. What I am desirous of obtaining is the length of the water right.

A. It runs down into Grizzly Gulch, through the city of Helena.

Q. What is the length of it from the point of diversion to here in Helena?

A. Must be twenty miles, or over.

Q. Were you acquainted with the Park Ditch and its construction at the time of its inception?

A. Yes, sir.

Q. Do you know anything about the general cost

(Testimony of Robert S. Hale.)

of the ditch? A. Yes, sir.

Q. What was the cost of that ditch?

A. The main ditch to Grizzly divide between \$30,000.00 and \$40,000.00 dollars. There are tributaries running to Dry Gulch and to Lump Gulch, but those are now abandoned. The ditch proper is from Lump Gulch to Grizzly divide.

Q. You may state whether or not in connection with that ditch there is any means of reservoiring water during the times of high water, so that it may be used in times of low water.

A. It is reservoired in Park Lake.

Q. Where is Park Lake?

A. It is situated half a mile above where the water is diverted from Lump Gulch, and into that lake we have a feeder from [77] Lump Gulch, about half a mile above where we divert the water, in the main line, that feeds Park Lake, and we run the water from Park Lake down into the main gulch, where I have a distributing reservoir 200 or 300 feet above where I take the water out of the main ditch.

Q. The Park Lake, then, is a part of the Part Ditch construction? A. Yes, sir.

Q. You then, as a matter of fact, have two ditches out of Lump Gulch?

A. One is a feeder for reservoir purposes, and the other is the main line of the ditch.

Q. And from the lake there is a connection by ditch with the main line?

A. Yes, sir, a little gulch leading down to the main ditch from the lake.

(Testimony of Robert S. Hale.)

Q. During what season do you use the feeder into the lake, what part of the season?

A. As long as there is any water running.

Q. You may state, Mr. Hale, if you know, the proportion of the waters of Lump Gulch that are taken out of it by these ditches.

A. It is all, pretty much.

Q. The entire water supply of Lump Gulch?

A. Yes, sir, of the waters above where the ditch taps it, it is all taken out.

Q. Is that true in seasons of very high water?

A. There may be for certain times a little overflow in the lower reservoir in the early season.

Q. For what purposes are the waters appropriated by this ditch used? A. Mining purposes. [78]

Q. How long has it been used for such purposes?

A. Since 1871.

Q. Do you speak of this of your own knowledge, or hearsay?

A. My own knowledge; I was one of the original locators, one of the parties who built the Park Ditch.

Q. What interest have you in the Park Ditch, yourself? A. Now, at this time?

Q. Yes, sir.

A. I own it.

Q. The entire Park Ditch and all of its tributaries? A. Yes, sir.

Q. How long have you owned the Park Ditch?

A. Since 1874; '74 I think it was sold.

Q. Since that time you have been the individual owner of the whole thing?

(Testimony of Robert S. Hale.)

A. Yes, sir, individually owned the whole plant.

Q. State what years since you have owned it you have operated the ditch for mining purposes.

A. I have operated it since I owned it, since '76—'75.

Q. Every year? A. Every year.

Q. During every mining season?

A. Continuously.

Q. And you are operating it now? A. Yes, sir.

Q. You may state whether the water supply of Lump Gulch, of which you have taken all, as you say, is more than sufficient for your mining operations.

A. They are not sufficient as I would like to have them.

Q. Is it true that you have had, ever since your ownership [79] of that property, and now, need all of the waters appropriated by the Park Ditch for your mining purposes?

A. Yes, sir; and I would like to have two months more.

Q. Two months more,—and a larger supply?

A. And a larger supply, yes, sir.

Q. I will ask you to state, Mr. Hale, whether at any time since this ditch was located any person other than the Park Ditch Company and yourself has had any use of the waters of Lump Gulch below the point of your diversion? A. No, sir.

Q. Do you mean that you have appropriated all the water for your mining purposes during the season?

(Testimony of Robert S. Hale.)

A. All the waters above the point where we take the ditch out?

Q. I will ask you whether or not you or the Park Ditch Co. have ever been interrupted or interfered with in the use of those waters?

A. None whatever.

Q. You may state whether prior to the appropriation of the water and the operations of that ditch, in anticipation of it, any arrangement was made with other parties claiming waters of Lump Gulch.

A. There were.

Q. What arrangement was made?

A. The arrangement was, there was a petition circulated to get the right to the use of all that water above this point of diversion from every man on the line of that ditch, from this point down to the Missouri river.

Q. Do you mean on the line of the ditch or Lump Gulch?

A. On Lump Gulch and Prickly Pear Creek.

[80]

Q. Did that embrace every one that had any claim to those waters?

A. Yes, sir; those whom we couldn't get to consent, we bought.

Q. So you acquired all rights?

A. All prior rights to that water.

Q. Was that instrument in writing?

A. Yes, sir.

Q. Have you got that instrument now?

A. No, sir.

Q. Have you made any attempt to find it?

(Testimony of Robert S. Hale.)

A. I have searched the records; I supposed it was put upon record.

Q. You are unable to find the document itself?

A. Yes, sir.

Q. But you saw it and know it was signed by the parties?

A. I saw it before it was sent out for circulation, but as to whether I saw it after, I don't know. Col. Woolfolk was general manager and he was attending to it.

Q. You may state whether since that time all prior owners have acquiesced in the use of the waters by the Park Ditch Company; there has been no objections? A. Not to me.

Q. You have been in charge all of these years?

A. Yes, sir, except before I purchased it, when Col. Wolfolk had it. I was a member of the Park Ditch Company, vice-president, and knew all about the proceedings.

Q. How many acres of mining ground do you own covered by this ditch?

A. Between five and six hundred acres. [81]

Q. In what counties?

A. In Lewis and Clark and Jefferson counties.

Q. You may state whether your possession and use, and the possession and use of the Park Ditch Company of these waters has been open and notorious or otherwise. A. Yes, sir.

Q. And the waters have been under claim of absolute title? A. Yes, sir.

No cross-examination.

Witness excused. [82]

[Testimony of John Shober, for Defendants.]

JOHN SHOBER, a witness called on behalf of Robt. S. Hale right, being duly sworn, testified as follows:

Direct Exemination.

(By Mr. BULLARD.)

Q. Your name? A. John H. Shober.

Q. Where do you reside, Mr. Shober?

A. Helena, Montana.

Q. And what is your age?

A. Seventy-five past.

Q. I will ask you to state whether you are acquainted with the property known as the Park Ditch running from Lump Gulch, in Jefferson county, to down over the divide and down Grizzley Gulch to the city of Helena, in Lewis and Clark County?

A. I am.

Q. How long have you known that property?

A. I have known it since the early seventies.

Q. Are you acquainted with Robt. S. Hale?

A. I am.

Q. Do you know what connection he has with that property?

A. I have understood that he has been the owner and controller since '76.

Q. That is the same property about which Mr. Hale has just been testifying?

A. The same property.

Q. I will ask you if you are acquainted with Lump Gulch? A. I am.

Q. Are you acquainted with the point where Park

(Testimony of John Shober.)

Ditch taps Lump Gulch? A. Yes, sir. [83]

Q. And Park Lake? A. Yes, sir.

Q. You may state whether, of your own knowledge, Park Ditch diverts the waters of Lump Gulch, and all of them, during ordinary seasons?

A. Ordinary seasons it diverts all the water of Lump Gulch flowing above where the ditch taps it.

Q. All above that point? A. Yes, sir.

Q. And state whether or not that has been true since your early knowledge of and acquaintance with the property.

A. That has been true in the ordinary stage of the water.

Q. You may state, Mr. Shober, whether you were at any time acquainted with or had knowledge of an arrangement made between parties claiming water rights in Lump Gulch in the early seventies and the Park Ditch Company?

A. In '70 or '71, I knew of some sort of an arrangement. It was a kind of stipulation that the appropriators of claims or claimants to water in Prickly Pear and Lump Gulch; that embraced about all the parties claiming water rights there, stating they would make no claim against the diversion of any of the waters above the point where this ditch tapped the creek; that is about the substance of it.

Q. Did you see that agreement?

A. I saw it at the time; I saw it in the hands of Colonel Wolfolk.

Q. Are you aware it was signed at that time?

A. It was signed by a number of parties; I cannot

(Testimony of John Shober.)

remember who they were. [84]

Q. You remember the effect of it was to relinquish—

A. To any waters of Lump Gulch above the point where the Park Ditch taps the waters of Lump Gulch. So far as the waters in this lake, there is not over twenty-five inches in a very low time, and the point of diversion is about 16 miles above the mouth of Lump Gulch.

Q. I will ask you if you knew B. B. Belcher?

A. Yes, sir.

Q. And what, if anything, concerning his claim to water rights?

A. He had a mining claim and water right in Lump Gulch, and disposed of it to parties interested in the Park Ditch.

Q. R. L. McMasters?

A. I am not so sure, but I am satisfied I know Al Axe.

Q. And he disposed of water rights to the company? A. Yes, sir.

No cross-examination.

Witness excused. [85]

[Testimony of Robert S. Hale, a Defendant, in His Own Behalf.]

ROBT. S. HALE testified as follows:

(By Mr. BULLARD.)

Q. You may state what, if any, effect on the waters of Lump Gulch below the point of diversion is had by reason of reservoiring the waters in the high season in Park Lake?

A. It has the effect of keeping the waters up be-

(Testimony of Robert S. Hale.)

low that point; there is a large seepage from the lake which flows back into Lump Gulch and helps to keep the water up during the months of July, August and September, when the people need it.

Q. What have you to say,—by reason of the Park Lake and the waters reservoired in it, as to whether below where you take all the waters of Lump Gulch, the waters through the farming season, are less or greater than they would be if Park Lake was not there?

A. It is greater, a great deal greater. It is quite a benefit to have that seepage flowing through during the dry months.

Witness excused.

Whereupon the hearing was adjourned to 2 o'clock P. M. of Tuesday, June 18, 1907. [86]

**[Testimony of Edward W. Payne, for Complainant
(in Rebuttal).]**

EDWARD W. PAYNE, a witness in rebuttal, by complainant.

Part of Direct Examination.

Q. Do you remember a man by the name of A. M. Wolfolk? A. I do.

Q. You may state whether or not he constructed a ditch that tapped some of the tributaries of Prickly Pear Creek? A. Yes, sir.

Q. What were you doing at that time?

A. I was farming down in the Prickly Pear Valley.

Q. Do you know whether or not there was circulated among the ranchers, or any attempt made by

(Testimony of Edward W. Payne.)

Wolfolk, to have then sign an agreement letting him *taking* the waters of some of the tributaries of Prickly Pear Creek?

A. There was a proposition of that kind made, but the ranchers, as I understand, didn't care to do it.

Q. Did you sign such as agreement?

A. I did not.

Q. Do you know of any ranchers in the Prickly Pear Valley who did sign such an agreement?

A. No, sir, not one.

Q. Do you remember about when it was he circulated this petition?

A. If my recollection serves me, I should say this happened in about 1867 or '68.

(P. 1663.)

Q. It might have been as late as 1870?

A. It might have been as late as 1870. [87]

[Testimony of W. L. Milligan, for Defendants (in Rebuttal).]

W. L. MILLIGAN, a witness in rebuttal of defendants' rights.

Part of Direct Examination.

Q. Did you know A. M. Wolfolk? A. Yes, sir.

Q. When was it that he began the construction of the ditch that tapped some of the tributaries of Prickly Pear Creek?

A. I don't believe I could tell you the date.

Q. Was it the same year he used lumber for building flumes? A. Yes, sir.

(Page 1668.)

A. N. Wolfolk circulated *and* agreement among

(Testimony of W. L. Milligan.)

the ranchers in the Prickly Pear Valley in Lewis and Clark County in reference to allowing him to take the waters from the streams that were tributaries to the Prickly Pear conveying them into other gulches so that the water would not flow down into the Prickly Pear?

A. Yes, he circulated a petition down there.

Q. You may state whether or not, as near as you can, what the contents of that petition was, the agreement.

A. The agreement was to bring the water down Holmes Gulch above all other ditches above East Helena, coming down there by the Child's ranch. He said he owned Holmes Gulch and wanted to bring the water in for that purpose; he said he was going to build up a reservoir up there and when there was plenty of water he would use it and we could use it after he used it.

Q. Where was the water to be used?

A. On Holmes Gulch.

Q. And for what purpose? A. Mining.

Q. And would that have lessened or diminished the supply of the ranchers in Lewis and Clark County? A. No, sir, it would have helped us.

Q. But did you ascertain that that wasn't where he was going to take the water? [88]

A. No, by himself; I always understood that he was going to take it down there.

Q. Did you sign the petition? A. No, sir.

Q. Do you know of any of the ranchers who did?

A. No, sir.

Page 1669.

(Testimony of W. L. Milligan.)

Q. Do you know of some who refused?

A. I do not; it never was brought up until most of them had gone away or died. He came to us separate. He would come to my house and then go down the creek.

Q. When did he come to your house with the petition or agreement?

A. I don't think there was any signers when he came to my house. I lived right on the road. [89]

[**Testimony of William Warren (in Rebuttal).**]

WM. WARREN, a witness in rebuttal.

Part of Direct Examination.

Q. Did you know A. M. Wolfolk? A. Yes, sir.

Q. Did you ever sign an agreement that he circulated through the valley, among the ranchers in Prickly Pear Valley, allowing him to take the waters of some of the tributaries of Prickly Pear Creek and reservoir them? A. No, sir.

Q. Do you know whether the man that you bought your ranch from signed such an agreement?

A. I never heard of anything like that.

Q. Did you ever have notice of any such agreement as this before this suit was brought and testimony was introduced by Mr. Hale? A. No, sir.

Q. Did you know of any recorded agreement of such kind? A. No, sir.

Q. Prior to the bringing of this suit in 1903, you may state whether or not there was a shortage of water by the use of the same by defendants in Jefferson county? A. Yes, sir.

Q. What year was it there was a particular short-

(Testimony of William Warren.)

age of water? A. I think in 1896.

Page 1672.

Q. How about the subsequent years up until 1903?

A. It has been short off and on ever since then.

Cross-examination.

(By Mr. THOMPSON.)

Q. Had there been any such an agreement as that which Mr. [90] Wolfolk may have had with reference to the reservoiring of these waters, would you have been likely to have heard of it?

A. I never heard of it.

Q. Would you have been likely to?

A. It seems like it; I have been in the valley a long time.

That's all.

Witness excused. [91]

[Testimony of Christmas G. Evans (in Rebuttal).]

Whereupon Mr. CHRISTMAS G. EVANS, a witness called and sworn in rebuttal, testified as follows:

Direct Examination.

(By Mr. McCONNELL.)

Q. State your name, residence and occupation.

A. Christmas G. Evans; Helena, merchandising.

Q. How long have you been a resident of Montana?

A. Well, I would have to stop and figure it out; I came here in 1864.

Q. In 1864? A. Yes, sir.

Q. That would be 44 years? A. Yes, sir.

(Testimony of Christmas G. Evans.)

Q. What business did you follow when you first came to Montana?

A. Well, I first engaged in mining.

Q. What, if any, business were you engaged in in 1870? A. Lumber business.

Q. Sawmill? A. Yes, sir.

Q. Where did you have a sawmill in 1870?

A. I moved over on to Lump Gulch in September, 1870?

Q. Did you know A. M. Wolfolk? A. Yes, sir.

Q. Do you know of his building a ditch that tapped some of the tributaries of Prickly Pear Creek?

A. Yes, sir.

Q. State what, if anything, you did with reference to furnishing lumber for flumes for that ditch. [92]

A. We furnished him some lumber in the fall of 1870 and the winter of 1871, and continued for a couple of years to furnish him lumber.

Q. Would you say that ditch was not completed until 1873?

A. Part of it was completed in 1872, I don't know but what the whole of it.

Q. In 1872? A. Yes, sir.

Q. When did he begin the construction of that ditch?

A. In the fall of 1870; I think some time about October.

Q. October, 1870? A. Yes.

Q. For what purpose did Mr. Wolfolk use the water that he took from the tributaries of Prickly Pear Creek? A. Well, for mining.

(Testimony of Christmas G. Evans.)

Q. And where did he do the mining?

A. Well, he done some mining on Holmes Gulch.

Q. And what became of the water after it was used by Wolfolk for mining in Holmes Gulch—where did it flow?

A. It went down into the Prickly Pear.

Q. Does Holmes Gulch come into Prickly Pear above East Helena? A. Yes, sir.

Q. For how many years did Wolfolk use his ditch in mining in Holmes Gulch, so that the water flowed back down into the Prickly Pear?

A. Well, he was mining there for several years, I don't know exactly how long; I don't remember.

Q. Do you know whether or not he subsequently took water in after years over the Orofino and Grizzly Gulch where Hale takes it now?

A. I don't know whether he took it there or whether it was taken there after. [93]

Q. You may state for how long after he quit mining in Holmes Gulch it was that this water was taken over into Grizzly and Oro Fino Gulches so that it would not find its way back into Prickly Pear Creek?

A. I can't state how long, but I know that that flume that carried the water around into Holmes Gulch fell down several years after he built it, but it run there for several years anyway.

Q. Could you approximate how many years after 1872 it was used there for mining in Holmes Gulch?

A. I think that there was water runing there until 1875.

Q. Could you tell us about what time it was that

(Testimony of Christmas G. Evans.)

the water was taken across the divide into Oro Fino and Grizzly Gulches?

A. No, sir, I was not up in that country; I don't remember.

Q. Do you recall whether or not you furnished any lumber to build flumes for the extension of that ditch across the divide?

A. Well, I presume we did, but I could not state now.

A. Would your books show?

A. Our books would show, of course. [94]

Q. Did you own a ranch at the Prickly Pear Valley in connection with your partner, Mr. Sanford, at the time Mr. Wolfolk was building a ditch tapping the tributaries of Prickly Pear creek?

A. In 1870?

Q. Yes, and later years?

A. Yes, sir; we owned a ranch there.

Q. Did you ever sign an agreement that Mr. Wolfolk circulated among the ranchers of Prickly Pear Valley allowing him to take that water and reservoir it? A. No, sir.

Q. Did you hear of such an agreement or petition?

A. Yes, sir; I have heard of such an agreement? That's all.

Witness excused. [95]

[**Testimony of H. L. Cram (in Rebuttal).**]

H. L. CRAM, a witness in rebuttal.

Direct Examination.

(By Mr. McCONNELL.)

Q. You have been sworn as a witness in this case

(Testimony of H. L. Cram.)

before? A. Yes, sir.

Q. And you are one of the intervenors in this action? A. Yes, sir.

Q. How long have you been living in the Prickly Pear Valley? A. Thirty-one years.

Q. You may state whether or not you ever signed an agreement circulated by Mr. Wolfolk and his associates, in reference to his taking the waters from the tributaries of Prickly Pear Creek and reservoiring them? A. No, sir.

Q. Do you know of anyone in the valley who did sign such an agreement or petition?

A. No, sir.

Q. Did your predecessors in interest sign such an agreement? A. He told me he never did.

Q. Who was your predecessor?

A. Harvey Jones; J. H. were his initials. [96]

[**Testimony of Hugh J. Rogan, for Complainant (in Rebuttal).**]

Whereupon HUGH J. ROGAN, a witness called and sworn in behalf of complainant, in rebuttal, testified as follows:

Direct Examination.

(By Mr. McCONNELL.)

Q. You are the same Hugh J. Rogan that has testified heretofore in this cause, are you?

A. Yes, sir.

Q. How long have you been engaged in ranching in the Prickly Pear Valley? A. 25 years.

Q. How long have you owned a ranch in the

(Testimony of Hugh J. Rogan.)

Prickly Pear Valley? A. 25 years.

Q. Did you know a man named A. M. Wolfolk when he was living in the city of Helena?

A. Yes, sir, I knew the gentleman.

Q. Did you ever hear of this agreement that has been testified to here on behalf of R. S. Hale that Mr. Wolfolk desired to have the ranchers of Prickly Pear sign? A. I have heard of it.

Q. Did you ever sign such an agreement?

A. No, sir.

Q. Do you know whether or not your predecessor in interest ever signed such an agreement?

A. They told me not; that is, Harry Nafus told me.

Q. Do you know of anyone in the Prickly Pear Valley who did sign such an agreement?

A. No, sir.

Q. Prior to the commencement of this suit in 1903, when, if at all, was there a shortage of water among the ranchers in the Prickly Pear Valley, in Lewis and Clark County?

A. Well, the shortage started to come along about, say, 1895 or 1896, and from that on down. [97]

[**Testimony of S. M. Meadows, for Complainant (in Rebuttal).**]

MEADOWS RIGHT.

Whereupon S. M. MEADOWS, a witness called and sworn in reference to the S. M. Meadows right, and in rebuttal, by complainant, testified as follows:

Direct Examination.

(By Mr. McCONNELL.)

Q. What is your full name, residence and occupation?

(Testimony of S. M. Meadows.)

A. Samuel M. Meadows; I live in the valley, post-office at Helena.

Q. And your occupation? A. Ranchman.

Q. How long have you lived in Montana?

A. Twenty-six or seven years.

Page 1738.

Q. Mr. Meadows, did you ever hear of the agreement that was circulated by A. M. Wolfolk among the ranchers in the Prickly Pear Valley, in which he asked them to allow him to divert water of some of the tributaries of Prickly Pear Creek over into Holmes Gulch. Did you ever hear any talk about that? A. I don't remember it.

Q. Did you ever sign such an agreement, allowing him to take the waters away from Prickly Pear Creek, so that it would not flow down to you?

A. No, sir.

Q. Do you know whether or not any of your predecessors in interest, or anyone ever owning the ranch you now live on, signed such an agreement?

A. Not to my knowledge.

Witness excused. [98]

That on the 15th day of June, 1911, an Opinion was duly filed herein, being in the words and figures following, to wit: [99]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation,
et al.,

Defendants.

Memoranda for Decision.

DIETRICH, District Judge:—

The record in this suit is voluminous, and was submitted upon a very brief oral argument. It is not impossible that I have inadvertently overlooked certain features of the record or have failed to give to certain facts their true significance. I have therefore thought it best to prepare tentative findings upon the cardinal issues, leaving the matter open temporarily for counsel to suggest wherein, under the record, a decree in accordance with such findings would be unjust. The schedule of dates and amounts hereto appended will therefore be deemed to be the basis of the decree, but will be subject to correction. However, it will not be understood that the case is to be reargued. Suggestions of change are invited only where the finding is without support in the record, or where there is some inadvertence as to the name of the owner or the stream from which

the water is diverted, or where it clearly appears that a decree in accordance with some one of the findings would operate harshly or unjustly.

Water suits involving numerous claims invariably present a great many perplexing questions, and the complications are always multiplied by the lapse of time, and very much augmented where, as here, many of the original appropriations of water were made primarily for mining purposes and at a time when there was very little law upon the subject. Many of the appropriations claimed in this case reach [100] back into the '60's, and those who made the appropriations doubtless little anticipated the conditions which have since developed. As in nearly all water cases, especially those involving early rights, the testimony is at best vague and uncertain, and in many respects highly conflicting.

Two features of the record here have been the source of much perplexity. Several of the larger rights were involved in a former suit which went to judgment in the State Court, and this judgment is doubtless binding as between the parties thereto. The substantial correctness of the findings in that case is not seriously called into question here, and upon the whole I have concluded it to be best not only to recognize the judgment as binding between the parties thereto, but also to take the same view of the facts as between all of the parties that the Court took in that case. While a different view of the facts is entirely possible, the conclusions reached in that case are not out of harmony with the record made in this case, and therefore even where this Court is permitted to act independently it has been deemed

to be wise to lean toward the findings and conclusions incorporated in that decree.

The other feature which has been the source of much perplexity is the extreme meagerness, if not in some cases a total absence, of proof as to the amount of land actually cultivated and irrigated, and the amount of water necessary for the irrigation thereof. So meager is the record that apparently the case was tried largely upon the theory that it was not necessary to offer evidence upon these issues. In many, if not in most, of the cases the claimants rely upon the actual diversion and use of water, the appropriations having been made before there was any statutory law prescribing the manner in which water could be appropriated. As I understand the rule in such cases, it is that in order to complete the appropriation the claimant must not only divert and carry to the point of intended use the water claimed by him, but he must apply it to a beneficial use. [101] He has a reasonable time in which to make such application, but he must make it. His right does not become complete until he makes use of the water, and he has a right only to so much as is reasonably necessary for the specified use. Upon a few claims only have we the definite testimony of a civil engineer who was sent upon the ground to make actual measurements of the amount of land under cultivation. Where the appropriation is claimed as of a date forty or twenty, or even fifteen years, prior to the commencement of the suit, it became material to know how much land had been put under actual irrigation,

and how much water was necessary for the irrigation of that land. Ordinarily, the claimant's right would not exceed the amount necessary for the irrigation of the land which he had actually brought under cultivation within such period. Generally, I have assumed an allowance of about fifty inches to eighty acres of land to be sufficient for the irrigation thereof. The rule, cannot, however, be rigidly applied. There are differentiating conditions. A very small claim presents some difficulties. It is doubtless true that upon lands of a certain character it is quite impracticable to use a head of water of less than twenty or twenty-five inches, and as a rule it is much better to have at least twice that amount. But upon the other hand, it would be unjust to allow a claimant twenty or twenty-five inches of water for the irrigation of three or four acres of land; such a use would be wasteful. The claimant who has only three or four acres of land can doubtless arrange with other claimants for the periodic use of a larger amount. It is well-known that rotation of use prevails in many communities where the holdings are small, such a method being necessary to avoid waste. It is suggested that if those who have only small acreages to irrigate feel that it will be impracticable for them to use the comparatively small amounts to be decreed to them continuously and that they cannot safely rely upon a voluntary [102] arrangement for rotation of use with other claimants, consideration will be given to the question of decreeing to them larger amounts, to be used periodically.

As to the earlier rights, those claimed from '63

and '64 and '65 and '66, I am inclined to think that substantial justice could be most nearly approximated by making awards to all claimants as of the same date, but by reason of the decree in the State Court such course seems to be impracticable. It is virtually impossible to determine with any degree of certainty upon what particular day, as a matter of fact and under the law, a water right fully accrued in those earlier years. The mere fact that some kind of a diversion was made for some purpose is not conclusive. The early ditch may have been very small and crude, as it often was, and was used for the diversion of a very small amount of water. The first and larger use was often only for a mining purpose, which is quite different in its effect from an agricultural purpose, in one case the water returning to the stream and in the other being lost to lower appropriators. While, of course, exact justice would not be done by placing all of the earlier appropriations upon the same plane, exact justice, under the circumstances, is impossible. Our conclusions are at best drawn from vague and uncertain evidence of crude conditions often difficult of legal classification.

With these observations, it is suggested that the following findings will be adopted as the basis for a decree, unless good reason is shown why, in specific particulars, they are erroneous and should be modified.

CLAIMANTS REPRESENTED BY McCONNELL & McCONNELL.

As I understand, all of the claims, both those of

the plaintiff and those of the intervenors, represented by Messrs. McConnell & McConnell, were involved in the suit of Calvin Beach vs. Flowerree, and others, in the State Court, and the claims made are in accordance with the decree in that case, and the findings [103] here made are also in accordance therewith. Hence,

The Ames Realty Company is entitled to 100 inches, from April 1, 1865; 190 inches, from April 1, 1866; and 167 inches, from April 6, 1866.

OF THE INTERVENORS.

William Warren is entitled to 98 inches, from April 1, 1866.

John L. Bunnell is entitled to 100 inches, from April 1, 1866.

Hugh Rogan and Patrick Rogan are entitled to 76 inches, from April 1, 1866.

H. L. Cram is entitled to 50 inches, from April 8, 1866.

Martin Woldson and T. W. Bynott are entitled to 134 inches, from April 8, 1866.

S. M. Meadows is entitled to 100 inches, from April 8, 1866.

W. L. Milligan is entitled to 20 inches, from March 1, 1865.

W. L. Milligan is entitled to 20 inches, from May 1, 1866.

Peter Hilger is entitled to 67 inches, from April 4, 1866.

Peter Hilger is entitled to 100 inches, from Nov. 24, 1866.

W. G. Preuitt is entitled to 100.5 inches, from April 20, 1866.

W. G. Preuitt is entitled to 50 inches, from May 10, 1866.

W. C. Preuitt is entitled to 100 inches, from April 1, 1867.

A. P. Hansen is entitled to 50 inches, from Nov. 24, 1866.

A. P. Hansen is entitled to 67.5 inches, from Feb. 10, 1869.

A. P. Hansen is entitled to 37.5 inches, from Oct. 15, 1866.

John Bower and C. B. Kountz, Sophia Symes, Catherine Symes, John Symes, and George Symes are jointly entitled to 112.5 inches, from October 15, 1866.

D. A. G. Flowerree is entitled to 33 inches, from May 1, 1865.

D. A. G. Flowerree is entitled to 184 inches, from April 6, 1866.

All of the foregoing rights, both of the plaintiff and of the intervenors, are in Prickly Pear Creek.

CLAIMANTS REPRESENTED BY MR.

SPAULDING.

Robert Strobel is entitled to 15 inches from Clancy Creek, from May 1, 1891.

A very strong plea is made upon behalf of this claimant, [104] based upon the theory that his use of the water does not diminish the flow of the stream. It is contended that because the lands of the claimant are contiguous to and slope rapidly toward the creek, and the soil is porous, the flow of the water

in the channel below the claimant's land is not appreciably diminished by reason of his use for irrigation purposes. This contention is very frequently put forward in water suits, and, of course, is usually advanced by the late appropriator and resisted by the early appropriator. While the record contains much in support thereof, I have not found it practicable to formulate a decree recognizing the theory and at the same time protecting the rights of the older appropriators. It is quite probable that if the claimant uses water very liberally upon his land during the flood season, thus thoroughly saturating it, the flow of the stream at some time thereafter, and for an indefinite period, would be augmented by the drainage, through percolation and otherwise, from the land. But I have not been able to see how a decree can be formulated upon data so meager. There is no answer to the question how soon after the water is placed upon the land the drainage will commence, or how long it will continue. It is doubtless true that some of the water placed upon the land during the low-water season will percolate back into the channel, but certainly not all of the water would find its way back, and it is impossible to determine from the record what specific amount the claimant should be credited with. While I would like in some way to protect the claimant in his use of the water in so far as such use does not infringe upon the rights of early appropriators, I see nothing to do at the present time but to determine the amount and date of his right and leave the question as to whether or not his use interferes with the rights of others to

future consideration. Certainly if his use of the water does not diminish the flow of the stream, such use would not infringe upon any other right, and therefore would not be in violation of the injunctive provision of the decree. [105]

CLIENTS OF SHOBER & RASCH.

M. A. Haynes is entitled to 60 inches from Clancy Creek, from April 1, 1865.

E. L. Marks is entitled to 32 inches from Lump Gulch Creek, and 16 inches from Prickly Pear Creek, from April 1, 1882.

Mary B. Logan is entitled to 27 inches from Warm Springs and Prickly Pear Creeks, from April 1, 1865.

A. H. Moulton is entitled to 45 inches from Prickly Pear and Beaverton Creeks, from April 1, 1865.

George Cockell is entitled to 35 inches from Prickly Pear Creek from April 1, 1865.

I. W. Marks is entitled to 21 inches from Prickly Pear Creek, from April 1, 1865; 8 inches from Dutchman Creek, from April 1, 1893; 7 inches from Dutchman Creek, from April 1, 1894.

Christian Nelson is entitled to 33 inches from Prickly Pear Creek, from April 1, 1865.

J. A. Fischer is entitled to 8 inches from Dutchman Creek, from April 1, 1870.

Christina Winslow is entitled to 21 inches from Dutchman Creek, from April 1, 1870.

Asleck Slenes is entitled to 22 inches from Prickly Pear Creek, from April 1, 1872.

P. A. LaRoy is entitled to 22 inches from Prickly Pear Creek, from April 1, 1872.

William Ogilvie is entitled to 22 inches from Warm Springs Creek, from April 1, 1886.

Herman Freyler is entitled to 10 inches from Homestake Creek, from April 1, 1872.

(The decree will provide that he may take this amount of water to the exclusion of all others absolutely after June 1st of each year, it appearing that naturally the creek discharges no water into Prickly Pear creek after that date.)

CLIENTS OF MR. HEYWOOD.

Catherine Sherman, as administratrix of the estate of William R. Sherman, deceased, is entitled to 25 inches from Prickly Pear Creek, from January 13, 1896; 10 inches from Shingle creek, from April 13, 1892.

(The decree will award to her all of Shingle Creek absolutely against all other claimants, it not being a tributary of the main stream during low-water season; also decree to her absolutely the spring located at point described at page 696 of testimony.)

Michael Foley is entitled to 30 inches from Lump Gulch Creek, from May 1, 1895. [106]

Charles Grossman, successor of Lind Warneck, is entitled to 12 inches from Little Buffalo Creek, from October 7, 1889.

Charles Grossman, as successor of Kate Cassidy, is entitled to 15 inches from Big Buffalo Creek, from April 1, 1896.

Harry Johnson is entitled to 16 inches from Lump Gulch Creek, from April 1, 1892.

Conrad-Stanford Company, a corporation, is entitled to 500 inches from McClellan Creek, from October 15, 1868.

CLIENTS OF MR. HEPNER.

Lawrence Wonderer is entitled to 20 inches from Prickly Pear Creek, from April 1, 1865; all of Strawberry Creek absolutely against all other claims, it not being tributary during the low-water season.

H. M. Hill is entitled to 5 inches from Clancy Creek, from April 1, 1865.

Charles B. Jastrow is entitled to 20 inches from Lump Gulch Creek, from April 1, 1882.

CLIENTS OF WALSH & NEWMAN.

Harry C. Burgess, successors to Reynolds Prosser, is entitled to 67 inches from Prickly Pear Creek, from September 30, 1862; 35 inches from Prickly Pear Creek, from January 1, 1869; and 1174 inches from Prickly Pear Creek, from May 1, 1889, the use thereof to be confined to power purposes, the water to be turned back in the stream without appreciable diminution of quantity or deterioration of quality.

The decree will also declare Burgess to be the owner of the two springs which he has developed (description of the springs will be found on last page of counsel's brief).

CLIENTS OF MR. HORSKY.

Harvey S. Mitchell, successor of Robert Robinson, successor of James H. Mulholan, is entitled to 22 inches from Jackson Creek, from April 1, 1887.

Gerhard Thies is entitled to 16 inches from Jackson Creek, from April 1, 1884.

The decree will provide that these two claimants are absolutely entitled to all the waters of Jackson Creek during the low-water season, the creek at that time not being a tributary of Prickly Pear Creek,

their rights, however, to be subject to those of Dina S. A. Turner.

Christian Wickersham is entitled to 15 inches from Spring Creek, from April 1, 1865.

CLIENTS OF MR. THOMPSON.

Helena & Livingston Smelting and Reduction Company is entitled to 80 inches from Prickly Pear Creek, from March 1, 1865; 80 inches from Prickly Pear Creek, from May 1, 1866; also 3,000 inches from Prickly Pear Creek, at the town of Jefferson, for power [107] purposes only, from April 29, 1875; also 25 inches from Golconda Creek; 100 inches from East Fork Creek; 50 inches from West Fork Creek; 250 inches from Beaver Creek; 100 inches from Weimer Creek; 150 inches from Anderson Gulch Creek; and 250 inches from Prickly Pear Creek, all for power purposes only, from March 10, 1896; also all the waters of Spring Creek, for power purposes, at the Corbin concentrator, from April 1, 1868.

(In all cases where the appropriation is for power purposes only the decree will make proper provision for the turning of the water back into the stream without diminution and without injury to appropriators for agricultural purposes.)

CLIENTS OF GALEN & METTLER.

Dina S. A. Turner, administratrix of the estate of David C. Turner, deceased, is entitled to 90 inches from Jackson, Lost and Crystal creeks, from January 1, 1866.

(The record does not seem to disclose clearly the relation of this claimant's right in Jackson Creek to the claims of Mitchell and Thies. The latter claim-

ants apparently contend that they take all of the water of this stream. Possibly, their points of diversion are lower down than that of Turner, and they have simply taken the surplus, their rights being subsequent in time. Unless counsel for these three parties can stipulate the form of the decree in this respect, it may be necessary to take additional evidence upon the point.)

B. Z. and J. W. Young, jointly, are entitled to 150 inches from McClellan Creek, from June 15, 1868.

T. H. Carter and B. R. Young, jointly, are entitled to 15 inches from Clark's Creek, from April 1, 1865.

Also 200 inches, from June 1, 1863, for mining purposes, the water to be turned back into the stream for agricultural uses.

(This claim presents serious difficulties. Except in so far as the water was used in connection with dredging operations, no use of the original appropriation has been made for a great many years, and were it not for the dredging operations apparently the right should be declared to have been forfeited by reason of nonuser. If the water is simply used for dredging purposes and permitted to go back into the stream, perhaps it is not very important to determine the exact amount to which the claimants are entitled.)

CLIENTS OF MR. BULLARD.

James Clegg, Perry H. Park, and Frank H. Turner, jointly, are entitled to 200 inches from Prickly Pear Creek, from April 1, 1865, for mining only, and after use must be turned back into the stream.

Hedvig Maria Erickson, successor to Martin

Broen, is entitled to 75 inches from Beaver Creek, from April 1, 1866.

Charles E. Brown, successor to J. J. Hall, is entitled to 30 inches from Spring Creek, from April 1, 1865; 40 inches from Prickly Pear Creek, from April 1, 1879.

Robert S. Hale is entitled to 400 inches from Lump Gulch Creek, from April 1, 1870.

(I am inclined to think that the decree should provide that the claimant may take all of the water of Lump Gulch Creek which flows down to his diverting works, not exceeding 400 inches, provided that he maintains the reservoir or artificial lake [108] practically in its present condition, so that lower appropriators will get the benefit of the seepage therefrom.)

CLIENTS OF D. M. KELLEY.

Christ Olsen, successor of Ole Noer, is entitled to 25 inches from Beaverton Creek, from May 1, 1880.

Counsel for the several parties will be given thirty days from the date hereof in which to suggest errors in the foregoing awards, within the scope of the suggestions hereinbefore made.

Upon the filing hereof, the clerk will forthwith give notice to all of the attorneys, and upon the expiration of the thirty days from the date hereof, the clerk is requested to forward to me any requests that may have been filed for modification of the suggested findings.

Dated this 14th day of June, 1911.

FRANK S. DIETRICH,
District Judge.

It is desirable that any suggestions offered should be clearly and concisely stated, with specific references to the testimony or other records relied upon.

[Indorsed]: Title of Court and Cause. Memoranda for Decision. Filed June 15, 1911. Geo. W. Sproule, Clerk. [109]

And thereafter, on August 7th, 1911, an Opinion was duly filed herein, which is in the words and figures following, to wit: [110]

In the Circuit Court of the United States for the District of Montana.

AMES REALTY COMPANY,

Plaintiff,

vs.

BIG INDIAN MINING CO. et al.,

Defendants.

Memorandum.

DIETRICH, District Judge:

A number of suggestions have been offered for the modification of the findings proposed in the memorandum of decision heretofore filed, and my conclusions are briefly stated as follows:

It was said in the memorandum that "where the appropriation is claimed as of a date forty or twenty or even fifteen years prior to the commencement of the suit, it became material to know how much land had been put under actual irrigation and how much water was necessary for the irrigation of that land. Ordinarily, the claimant's right would not exceed the amount necessary for the irrigation of the land which

he had actually brought under cultivation within such period." In comments upon this statement made in one of the briefs the term "appropriation" is frequently used apparently as a synonym of the term "diversion." Ordinarily, appropriation of water is not consummated until the water has been diverted from the stream, carried to the place of intended use, and is actually applied to such beneficial use. Where the claimant relies upon actual appropriation as the basis for his right, he should be awarded the right as of the date of the diversion, only upon condition that he has applied the water to a beneficial use within a reasonable time. No definite period can be fixed for the reason that the circumstances and conditions of each appropriation are to be taken into consideration in determining whether the application has been made within a reasonable time. It was and still is thought that in the absence of some showing disclosing unusual conditions the failure of one who diverts water, to make [111] application thereof to the land for which it is claimed within forty or twenty or even fifteen years should deprive him of the right to claim an appropriation of the water as of the date of the original diversion. One who would acquire such a right, which is in the nature of a gratuitous grant, must act with reasonable diligence in complying with the conditions of the grant, one of which is the beneficial application of the water. This view is not inconsistent with anything said by the Supreme Court of Montana in the cases cited, and is in harmony with the general rule prevailing in the arid regions.

SUGGESTIONS MADE BY MR. McCONNELL.

All of the suggestions made in the brief filed by Mr. McConnell, except those relating to the right of Robert S. Hale, concern the propriety of awarding certain small streams absolutely to the claimants. I think the record is sufficiently definite and certain to authorize the finding that the plaintiffs and intervenors would receive no benefit from these streams if they were permitted to flow without interruption. The waters thereof would not reach the streams tapped by the ditches of the plaintiffs and the intervenors. It is possible that in an extraordinary season there would be a little overflow, but I still am of the opinion that it is proper to decree these waters to the claimants absolutely. Hence no changes will be made as to the rights of *Herman Freyler, Catherine Sherman, Lawrence Wonderer* and *Harvey S. Mitchell*. The *Robert S. Hale* right is considered under the head of Galen & Mettler's clients.

CLIENTS OF GUNN & HALL.

In the case of *E. L. Marks* it is urged that a larger amount be awarded, for the reason, as stated, that the claimant has 75 acres under cultivation. At page 1682 of the record, it conclusively appears that at the commencement of the suit he had only about 64 acres under cultivation, and shortly before the trial he had cleared [112] an additional four acres, making at the most 68 acres, for the irrigation of which he was awarded 48 inches of water. I am not convinced that my original conclusion was in this respect unjust.

Upon a review of the record, however, I have de-

ecided to give this right the earlier *date of April 1, 1865*, instead of the date of April 1, 1882. The conflict in the testimony upon this point is a peculiar one, and in fixing the date as of April 1, 1882, I took the testimony of James B. Halford as perhaps the most credible. I overlooked the testimony of his brother Dodley Halford, which is in direct conflict with that of James B., and inasmuch as Dodley Halford's recollection of the facts is corroborated by the testimony of some other witnesses I have decided to adopt the earlier date.

As to the *Christian Nelson* claim, it appears that it is 17,400 feet from the point of diversion to land where the water is used. On account of the length of the ditch and other conditions, the loss of the water is abnormal. I have, upon reconsideration of the record, decided to award to him *55 inches* instead of 33 inches.

As to the rights of *I. W. Marks* and *George Cockell*, no new considerations are brought to my attention which are deemed sufficient to warrant a modification of the award heretofore suggested.

As to the *Chris Wickershein* right, I think it must be found as a fact that this right, which dates from 1865, was never used upon more than eight acres. In other words, the beneficial use of the claim is confined to eight acres of cultivated land. The witness Helmick, who made measurements of the land, fixes the amount at 7.8 acres. This witness estimated that 15 inches would be a fair allowance for the land, with the explanation that while that amount could not be used all the time, a smaller stream would not go

through the ditches. I am urged to increase the amount to 25 inches, but it is not thought that the reasons given in support of the request are sufficient to warrant such an increase. The conditions are somewhat peculiar, and upon consideration I have decided to raise the amount to *18 inches*. [113]

As to the other suggestion upon behalf of this right, I do not find the record sufficiently definite to warrant me in decreeing definitely that Wickershein may use the whole of the flow of the stream at any time. Of course, if the amount of the flow in excess of his right is insufficient during a period of the year to be available for any other claimant, his use of such excess would be without injury to such other claimant, but it is not thought that the facts are sufficiently clear to warrant a decree authorizing such use at any particular period.

CLIENTS OF MR. BULLARD.

No substantial reason appears in the suggestions of counsel why a change should be made in the award heretofore suggested for the Clegg, Park and Turner claims. The date of the *Erickson* right will be changed from April 1, 1866, to *April 1, 1865*. The evidence supports the latter date. The pleading, however, should be amended to conform to the proof, the claim of the pleading being only from 1866.

In the matter of the Hall right, now owned by *Charles E. Brown*, I have concluded to award *60 instead of 30 inches* from Spring Creek, as of the date of April 1, 1865. The other award of 40 inches from Prickly Pear Creek, as of April 1, 1879, is permitted to stand. Counsel now suggests that Brown

be awarded the whole of Blue Bell Creek, dating from the year 1876, but I find no warrant in the evidence for such a provision in the decree. My attention is not called to any testimony from which it appears that the waters of this stream do not reach Prickly Pear Creek, or that Brown ever claimed the exclusive right to the whole of the stream. So far as I have been able to discover, this claim is asserted for the first time in the suggestions now made, since the filing of the original memorandum. I do not find among the files the cross bill in which the Hall or Brown right is set up, but neither in the testimony, so far as I have been able to discover nor in the original brief filed upon behalf of Brown, is there any suggestion that the waters of this stream be decreed to Brown absolutely. [114]

As to the claim of *Robert S. Hale*, counsel urges that the decree suggested should be modified in several particulars. It is first contended that inasmuch as the Park ditch was "located" in the fall of 1869, the right should relate back to that date. But where for appropriation reliance is had upon the actual diversion and use of water, the rights thus acquired do not relate back to the mere location of the ditch, but at most cannot be held to antedate the actual diversion of the water.

In the second place, it is urged that the claimant is entitled to all of the waters of Lump Gulch Creek, and should not be limited to 400 inches. But the claimant, testifying upon his own behalf, stated that there were times when some of the water of the gulch wasted over his dams. He further estimated the

carrying capacity of the ditch at about 400 inches. I am therefore still of the opinion that the original date and amount of the appropriation are as nearly correct as is possible to approximate under the evidence.

The third contention, and that most elaborately discussed by counsel for the claimant, is that, regardless of the date of the appropriation, the claimant should be awarded the waters of the stream absolutely, notwithstanding earlier appropriations of water. The contention is urged upon two different grounds, one being that about the time the claimant's ditch was constructed, other claimants of waters from the stream waived their prior rights. While the evidence is sufficient to support a finding that a written waiver was circulated among the users of the waters of the stream and was signed by some of them, there is insufficient evidence from which to find that all of the claimants waived their rights. As an illustration of the character of the evidence upon this point, reference is made to the testimony of the claimant himself. At page 971 he stated that he and his associates bought the rights of all of those who would not consent to waive their rights. The waiver, he says, was in writing, and the instrument cannot be found. In reply to a question as to whether or not he ever saw the written waiver, his answer is, "I saw it before it was sent out for circulation, but as to whether I saw it after, I [115] don't know. Colonel Wolfolk was General Manager, and he was attending to it." That he saw an unsigned agreement is proof of nothing. The question is who

signed the paper, and what in substance did it contain. As already suggested, while the testimony is sufficient from which to find that an effort was made to procure a waiver of all prior rights, and that some of the claimants signed such waiver, the record does not warrant a finding that all prior rights were waived.

The other ground upon which the claimant relies for *absolutel* ownership is adverse user or title by prescription. The contention I think must, however, be disposed of adversely to the claimant upon his own testimony. Upon page 976 of the record, upon being recalled, the claimant testified that his storage of the waters and his use thereof have not prejudiced or interfered with the rights of other claimants diverting water from the stream below his point of diversion. Speaking of his use of the water, he expressly says: "It has the effect of keeping the waters up below that point (his point of diversion). There is a large seepage from the lake which flows back into Lump Gulch and helps to keep the water up during the months of July, August, and September, when the people need it." Upon the same page he says that the volume of water in Lump Gulch, below his point of diversion, is greater during the farming season than it would be if the stream were left in its natural condition. Indeed the view of the claimant is very succinctly and clearly stated in the supplemental brief filed upon his behalf, as follows: "The testimony as outlined in the former brief in behalf of this defendant, and as the same appears of record, is conclusive, uncontradicted, unas-

sailed, that the use of all waters of Lump Gulch above the head of defendant's ditch never has deprived and does not now deprive, and cannot deprive, the complainant, or any other user of water, of any water to which they are or may be entitled, for the reason that the reservoiring of the waters in the Park Lake of the defendant results in a seepage coming into Lump Gulch, below the head of the defendant's ditch that supplies a larger amount of water below the point of defendant's diversion than would flow down said stream [116] if the waters were not in fact diverted by the defendant Robert S. Hale, and reservoired during the season of high water." If this be true, how can it be possible to hold that the claimant has acquired any right by adverse user? If the facts are as they are here stated to be, there has never been any hostile use of the water, there has never been any invasion of the rights of any other claimant upon the stream, all the claimants have always gotten all the water that they have been entitled to, and have had no reason to complain of the claimant's use. The essential elements of adverse user are wanting.

In the former memorandum it was tentatively suggested that the decree provide that the claimant should take all the waters of Lump Gulch Creek not exceeding 400 inches, upon the condition that he maintain the reservoir or artificial lake practically in its present condition so that the lower appropriators would get the benefit of the seepage therefrom. This suggestion was made upon the assumption that there is no question that the seepage is substantially equivalent to the natural flow of the stream.

However, both the claimant and the plaintiffs and intervenors for divers reasons now express dissatisfaction with such proposed provision in the decree. It is difficult to understand upon what theory the claimant can properly object thereto. Even if it were found that earlier appropriators of water waived their rights so far as they were to be impinged by the construction and maintenance of the claimant's diverting works, it does not follow that they have also given their consent to being entirely deprived of the use of the waters of Lump Gulch Creek. It is not unreasonable to assume that in seeking the waiver it was represented, upon behalf of the claimant and his predecessors in interest, that the reservoiring of the water would do earlier appropriators no substantial injury, inasmuch as they would receive the advantage of the large seepage during the dry months of the farming season. And as to the claim of a prescriptive right, it could in no case exceed the extent of the adverse user out of which it has grown. [117]

Upon reconsideration of the record, and especially of the practicability of making provision in a decree by which other users of the waters of the stream will be assured of a continuance of the present amount of seepage from the claimant's reservoir, I have concluded it better to decree the amount of water to which the claimant is entitled, together with the date of his right, and leave the question open as to whether or not the seepage at any particular time is equal to the natural flow of the stream. If, as is asserted by the claimant, the seepage is equivalent to such natural flow, a prior appropriator cannot complain of his

diversion. *Hale will therefore be awarded 400 inches from April 1, 1870.*

CLIENTS OF MR. HEPNER.

The amount awarded to *H. M. Hill* is increased from 5 to 10 inches. It may be that the larger part of this will be lost if the claimant undertakes to use just the 10 inches at all times, but doubtless he can make some arrangement for rotation of use so that he will have an irrigating stream for a short period, and then cease to use the water entirely for a certain period.

CLIENTS OF GALEN & METTLER.

Both the date and amount of the *Dina S. A. Turner* right will be modified, and she will be awarded 125 inches, dating from *August 1, 1866*. Upon a re-examination of the record, I am satisfied that the date originally given, namely, January 1, 1866, was due to inadvertence. The testimony is not very clear upon the point, but upon the whole I have concluded that August 1, 1866, is approximately the date when the water was first used.

My attention is called to the fact that the place of application of the water is about nine miles from the point of diversion, and that necessarily there must be considerable loss by seepage and evaporation. The carrying capacity of the ditch is left very much in doubt, one witness giving it at about 100 inches, and another at about 150 inches. The water is used for both mining and agricultural purposes. Justice to a certainty is impossible upon such an indefinite [118] and unsatisfactory record, but perhaps 125

inches is a reasonable approximation of the amount to which the claimant is entitled.

I cannot yield to the claimant's contention that she be awarded all of the waters flowing in Jackson Creek, Lost Creek, and Crystal Creek, absolutely. A case is not presented where the water, if permitted to flow down the natural channels of these streams, would not reach Prickly Pear Creek. It is true the claimant contends that she has always used the entire amount of water now claimed, but such a contention is made in nearly every case.

As to the irrigation rights of T. H. Carter and B. R. Young no substantial reasons are urged for modifying the award originally suggested. It is true that 15 inches do not furnish a very large irrigating head, but obviously it would be unjust and contrary to public policy to decree to a claimant the right to use 40 or 50 inches of water for the irrigation of 10 or 15 acres of land because less than that amount is not a good irrigating head. It is not doubted that where the amount awarded is insufficient for a good irrigating head rotation of use can be arranged for either voluntarily or compulsorily.

As to the other claim of Carter and Young, I have concluded to award 1,000 inches instead of 200 inches, dating from June 1, 1863, from Prickly Pear Creek, for mining and milling purposes, the decree to provide that the water thus used is to be turned back into the stream, without substantial diminution for agricultural uses.

My original view was, not that the right should be declared to have been abandoned, but that it should

be declared to have been forfeited, in part at least, for nonuser. The record unequivocally shows that there has been little use of the water for approximately 20 years, and that the ditches through which the water is diverted from the natural stream have been filled up and destroyed. While there is considerable evidence from which the intention to abandon could be inferred, upon the whole, I think it must be concluded that such intention has not, as a matter of fact, ever existed. A distinction, however, is made between abandonment, always involving intention, and [119] forfeiture because of nonuser. Forfeiture by nonuser does not involve an intention upon the part of the claimant to relinquish his right; forfeiture is against his will. The distinction is clearly made in *Smith vs. Hawkins* (Cal.), 42 Pac. 453. I find, however, upon examination of the statutes, that the California statute, like that of Idaho, is different from that of Montana. Both the California and Idaho statutes provide that when the appropriator "ceases to use it (the water) for such a purpose (a useful or beneficial purpose) the right ceases." Section 2 of the Montana act, approved March 12, 1885, as read into the record, at page 1280, provides that the appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest "*abandons and ceases to use the water for such purpose the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact.*" Apparently under this section the right can be lost only by voluntary abandonment.

While no case from the courts of the state of Montana has been called to my attention wherein the precise question is decided, several cases have arisen where the doctrine of abandonment has been clearly recognized and announced, the rule there being, as in other jurisdictions, that abandonment involves an intention on the part of the appropriator to relinquish or let go of his right.

It further appears that the abandonment or forfeiture of this right is not affirmatively put in issue by any of the pleadings.

Counsel for the plaintiff and the intervenors are directed to prepare a decree in accordance with the original memorandum of decision, with modifications as hereinbefore suggested. No findings of fact or conclusions of law need be prepared, and the decree shall contain no recitals other than those prescribed by the general equity rules. Care should be taken to prepare the schedule of the several rights in such a way as to be subject to easy reference, and it is suggested that the rights be arranged in two different groups, one embracing all agricultural rights and the other embracing mining, milling and power rights, and that in each group the names of the owners be arranged [120] alphabetically. The decree should by apt language provide that waters used for mining, milling and power purposes should be turned back into the stream without substantial diminution. The streams from which the water is to be diverted in each case should be named. From what was said at the oral argument, it is probably impracticable specifically to describe the point of diversion or the place

of use, but at least the stream from which the water is diverted should be named. In all cases the amount awarded is to be measured at the point where the water is diverted from the natural stream. The decree should contain the ordinary provision enjoining each of the parties from interfering with the rights of any other party to the suit, and there should be expressly reserved to the Court jurisdiction over the parties and the several claims for the purpose of enforcing the decree through a water master or commissioner, and also compelling rotation of use where such method of applying the waters is necessary or highly desirable.

From time to time, suggestions have been made that in some instances the decree run in favor of present owners, who are not parties to the suit, the claims having been transferred since the pendency thereof. Counsel desiring such provision in the decree should call the matter to the attention of counsel for the plaintiff, and a stipulation should be filed so that there will be something in the record warranting such form of decree. It is further suggested that in any such case the decree expressly state that the person to whom the water is awarded is the successor in interest of the proper party to the suit, naming him.

Before the form of decree is sent for signature, it is suggested that it be exhibited to the several attorneys of record for their approval, in order that inadvertent errors may be avoided.

Dated this 4th day of August, 1911.

[Indorsed]: Title of Court and Cause. Memorandum. Filed Aug. 7th, 1911. Geo. W. Sproule, Clerk. [121]

And thereafter, on October 7, 1911, a Final Decree was filed and entered herein, being in the words and figures following, to wit: [122]

[Final Decree.]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, Helena and Livingston Smelting and Reduction Company, a Corporation, Helena Land and Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenec, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Strobel, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead,

Lind Warneck, Kate Cassidy, G. W. Jensen, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrihan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clark, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield,

Defendants. [123]

WILLIAM WARREN, John L. Bunnell, Hugh Rogan and Patrick Rogan, H. L. Cram, Martin Woldson, and T. W. Synott, S. M. Meadows, W. L. Milligan, Peter Hilger, W. G. Preuitt, A. P. Hanson, John Bower, and C. B. Kountz, Sophia Symes, Cathering Symes, John Symes, and George Symes, D. A. G. Floweree, Conrad-Stanford Company,

Intervenors.

BE IT REMEMBERED that this cause came on regularly to be heard in term and was submitted upon the testimony heretofore taken before a special examiner appointed by the Court and upon written

briefs and oral arguments of counsel for the respective parties; and thereupon, after due consideration thereof, it is ORDERED, ADJUDGED AND DECREED that the rights of the respective parties herein, complainant, defendants and intervenors, be and the same are hereby fixed, settled and determined in the amount, from the stream and of the date set opposite the names of said parties as follows, to wit:

Name	Amount in Miner's Inches	Stream from Which Taken	Date of Appropriation
Realty Company	100	Prickley Pear Creek	April 1, 1865
" "	190	Prickly Pear Creek	April 1, 1866
" "	167	Prickly Pear Creek	April 6, 1866.
Bower Kountz Symes, Kathering Symes, in Symes and George nes, jointly	112.5	Prickly Pear Creek	October 15, 1866.
es E. Brown, successor to J. Hall,	60	Spring Creek	April 1, 1865
" "	40	Prickly Pear Creek	April 1, 1879
Name	Amount in Miner's Inches	Stream from Which Taken	Date of Appropriation
Bunnell	100	Prickly Pear Creek	April 1, 1866
C. Burgess, ssor to Reynolds Prosser	67	Prickly Pear Creek	September 30, 1862.
" " "	35	Prickly Pear Creek	January 1, 1869
Also the absolute ownership of all developed bedrock waters conveyed in pipe system from Holmes Gulch, in Section 1, Township 9 North of Range 3 West; also all developed bedrock waters developed in McClellan Gulch, in Section 8, Township 9 North of Range 2 West.			
Carter and B. R. Young, ntly, e Cockell	15	Clark Creek	April 1, 1865
ran-Stanford Company,	35	Prickly Pear Creek	April 1, 1865
Cram,	500	McClellan Creek	October 15, 1868
	50	Prickly Pear Creek	April 8, 1866
g Maria Erickson, succes- to Martin Broen,	75	Beaver Creek	April 1, 1865
Fischer,	8	Dutchman Creek	April 1, 1870
G. Flowerree,	33	Prickly Pear Creek	May 1, 1865
" "	184	Prickly Pear Creek	April 6, 1866
el Foley	30	Lump Gulch Creek	May 1, 1895
an Freyler	10	Homestake Creek	April 1, 1872
Also the right to the use of the waters of Homestake Creek during the irrigating season of each year commencing with June 1st, absolutely without regard to dates of appropriation.			
es Grossman, as successor to d Warneck	12	Little Buffalo Creek	October 7th, 1889
ccessor to Kate Cassidy	15	Big Buffalo Creek	April 1, 1896

Name	Amount in Miner's Inches	Stream from Which Taken	Date of Appropriation
Helena and Livingston Smelting and Reduction Company	80	Prickly Pear Creek	March 1, 1865
“ “ “	80	Prickly Pear Creek	May 1, 1866
R. S. Hale	400	Lump Gulch Creek	April 1, 1870
H. M. Hill	10	Clancy Creek	April 1, 1865
M. A. Haynes	60	Clancy Creek	April 1, 1865
A. P. Hansen	50	Prickly Pear Creek	November 24, 1866
“ “ “	67.5	Prickly Pear Creek	February 10, 1869
“ “ “	37.5	Prickly Pear Creek	October 15, 1866
Peter Hilger	67	Prickly Pear Creek	April 4, 1866
“ “	100	Prickly Pear Creek	November 24, 1866
Harry Johnson	16	Lump Gulch Creek	April 1, 1892
P. A. Laroy, as successor to Marion D. Steves	22	Prickly Pear Creek	April 1, 1872
Mary B. Logan	27	Warm Springs Creek and Prickly Pear Creek	April 1, 1865
E. L. Marks	32	Lump Gulch Creek	April 1, 1865
“ “ “	16	Prickly Pear Creek	April 1, 1865
I. W. Marks	21	Prickly Pear Creek	April 1, 1865
“ “ “	8	Dutchman Creek	April 1, 1893
“ “ “	7	Dutchman Creek	April 1, 1894
S. M. Meadows	100	Prickly Pear Creek	April 8, 1866
W. L. Milligan	20	Prickly Pear Creek	March 1, 1865
“ “ “	20	Prickly Pear Creek	May 1, 1866
Harvey S. Mitchell, successor to James H. Mulhollen	22	Jackson Creek	April 1, 1887

Also, subject only to the right of Gerhard Thies as hereinafter defined, all of the waters of Jackson Creek during the low-water season commencing June 1st, each year, absolutely without regard to dates of appropriation.

[FSD]

A. H. Moulton [126]	45	Prickly Pear Creek	April 1, 1865
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Name	Amount in Miner's Inches	Stream from Which Taken	Date of Appropriation
FSD]			
Christian Nelson	55	Prickly Pear Creek	April 1, 1865
Christian Olsen, successor to Ole Noer,	25	Beaver Creek	May 1, 1880
William Ogilvie,	22	Warm Springs Creek	April 1, 1886
W. G. Preuitt	100.5	Prickly Pear Creek	April 20, 1866
" " "	50	Prickly Pear Creek	May 10, 1866
" " "	100	Prickly Pear Creek	April 1, 1867
Hugh Rogan and Patrick Rogan, jointly	76	Prickly Pear Creek	April 1, 1866
Catherine Sherman, Administra- trix of the estate of William R. Sherman, deceased,	25	Prickly Pear Creek	January 13, 1896
" " "	10	Shingle Creek	April 13, 1892
Also, without regard to dates of appropriation, all of the waters of Shingle Creek during the low-water season, commencing June 1st each year; she is also awarded ab- solutely for her use at all times all of the waters of a certain spring, situated about 500 ft. southwest from the northwest corner of Sherman's ranch.			
Asleck Slenes	22	Prickly Pear Creek	April 1, 1872
Robert Strobel	15	Clancy Creek	May 1, 1891
Dima S. A. Turner, Administra- trix of the Estate of Davis C. Turner, deceased,	125	Jackson, Lost and Crystal Creeks, jointly,	August 1, 1866
And claimant is entitled to convey the water away from the water-shed of the streams named to the place where the same has been heretofore used, and may use the same both for mining and irrigation purposes; and after June 1st of each year claimant may during the remainder of the irrigat- ing season take the amount of water, absolutely regardless of dates of appropriation. The Jackson Creek here referred to is the one from which claimant now diverts water, and is not the Jackson Creek referred to in connection with the Mitchell and Thies rights.			
Gerhard Thies	16	Jackson Creek	April 1, 1884
After June 1st of each year, during the remainder of the irrigating season claimant is entitled to take the amount named, absolutely, regardless of dates of appropriation.			
William Warren	98	Prickly Pear Creek	April 1, 1866
Christina Winslow	21	Dutchman Creek	April 1, 1870
Christina Wickersham	18	Spring Creek	April 1, 1865
Lawrence Wonderer	20	Prickly Pear Creek	April 1, 1865
Also, absolutely regardless of dates of appropriation, all of the waters of Strawberry Creek during the low-water season, commencing June 1st of each year.			

Name	Amount in Miner's Inches	Stream from Which Taken	Date of Appropriation
Martin Woldson and T. W.			
Synott, jointly	134	Prickly Pear Creek	April 8, 1866
Charles B. Zastrow	20	Lump Gulch Creek	April 1, 1882
FOR MINING, MILLING, POWER, AND CONCENTRATING PURPOSES ONLY.			
Harry C. Burgess, as successor to Reynolds Prosser	1,174	Prickly Pear Creek For power purposes only.	May 1, 1889
Helena and Livingston Smelting and Reduction Company, a corporation,	3,000	Prickly Pear Creek For power purposes only.	April 29, 1875
"	Also 25	Galconda Creek,	
"	100	East Fork Creek,	
"	50	West Fork Creek,	
"	250	Beaver Creek,	
"	100	Weimer Creek,	
"	150	Anderson Gulch Creek,	
"	250	Prickly Pear Creek,	
		All of date of	March 10, 1896
		And for power purposes only.	
"		Also all of the waters of Spring Creek for power and concen- trating purposes only,	April 1, 1868
Benjamin Z. Young and Joseph W. Young, jointly	150	McClellan For mining purposes only.	June 15, 1868
T. H. Carter and B. R. Young, jointly	1,000	Prickly Pear Creek For mining and milling purposes only.	June 1, 1863
James Clegg, Perry H. Park and Frank K. Turner, jointly	200	Prickly Pear Creek For mining purposes only.	April 1, 1865

IT IS FURTHER ADJUDGED AND DECREED, that the water awarded for mining, milling, concentrating and power purposes only, or for any of said purposes, shall when diverted by said parties be returned to the stream from which it was diverted without any appreciable diminution of quantity or deterioration in quality, to the end that agricultural rights in and to the waters of said stream shall not be substantially affected by reason of such uses, and the award for such purposes is made upon condition that the waters be so returned to the stream substantially undiminished in quantity and unimpaired in quality; provided, however, that the right awarded to Benjamin Z. Young and Joseph W. Young is excepted from this requirement for the reason that said claimants necessarily convey the waters appropriated by them out of the water-shed of the stream from which the same is diverted.

IT IS FURTHER DECREED, that by the term "inch" of water, as the same is used in this decree, a miner's inch as defined by the statutes of Montana is intended; that is to say, one hundred inches of water, as the term is herein used, are equivalent to a flow at the rate of two and one-half cubic feet of water per second.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that each owner of a ditch and water right, as herein enumerated, shall construct and maintain a good and sufficient headgate and measuring-box at respective points of diversion of said ditch or ditches from said streams so that the water herein awarded shall and may be correctly

measured to each of said parties at the head of their respective ditch or ditches, where the same taps the stream from which the appropriation is made, and said water shall be measured to the parties at the head of the respective ditch or ditches of each party.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that each and all of the parties who have been awarded amounts of water shall have, and they are hereby given, the right to use the quantities of water so awarded to each party according to their respective priorities as herein fixed by this decree.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that each of [129] the parties herein awarded water rights, and his heirs, assigns, successors, personal representatives, tenants, sub-tenants, agents, attorneys, servants, and employees, and each and all of them, and any and all persons acting by, through or under them, or either of them, be and he is hereby perpetually enjoined and restrained from ever, at any time, or in anywise or manner, interfering with, molesting or intermeddling with any of the water rights of any and all other persons herein as the same are fixed, ascertained, adjudged and decreed by this decree.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED, that the owner or owners of the several ditches and water rights enumerated shall turn the water back into the contributing stream when such water is not actually being needed and used for some beneficial purpose, and there is hereby expressly reserved to this court

jurisdiction over each and all of the parties hereto, and their heirs, executors, administrators, successors and assigns, and of the several claims and water rights herein adjudicated for the purpose of enforcing this decree, and of appointing a water master or commissioner for carrying out the said decree, and also compelling a rotation of the use where such method of applying the water is necessary or desirable, and in case of the failure, refusal or neglect of any of the parties hereto, or their successors or assigns, to conform to and abide by the adjudication herein made to adjudge said party guilty of a contempt of this Court, and upon a proper showing thereof to the Court that such parties shall be subject to such pains and penalties as the Court may impose.

And it further appearing to the Court that upon the filing of the bill of complaint in this case a subpoena was duly issued and served on the defendants hereinafter named, and that no appearance has been entered on the part of said defendants, or demurrer, or plea, or answer or cross-complaint filed, and that the names of said defendants so failing to appear, demur, plead or answer are as follows, to wit: [130]

William Bevins, D. W. Beach, James Boone, Frank Bruce, Lizzie Bailey, Benjamin Borgstead, Chicago Reduction Works, I. B. Cutler, Frank Clark, James A. Carrier, S. I. Deal, Chas. A. Donnelly, E. C. Drosch, J. Ellis, H. W. Fry, F. M. French, H. L. Goudy, Helena Land and Improvement Company, Edward Heater, George Herbert, Otto Hofstead, Fred Hart, John Haab, J. W. Holt, E. J. Harris, C. W. Jensen, Joseph Kastner, Jacob

Kahler, Chas. Koegle, Peter Leary, Mary Leary, Robert Lynnes, H. E. Minter, John T. Murphy, Malcolm D. McRae, M. J. McDaniel, F. Mason, B. N. J. Miljouer, J. B. Maxfield, H. O. Nash, Anna E. Nash, John O'Keefe, Chas. O'Connell, John Pohl, Nellie R. Ricketts, Antone Semenec, Trued Swanson, A. L. Thorn, George Webster, and Benjamin Wahle.

And it further appearing to the Court that the following named parties were duly served with subpoenas and entered their appearance in this cause, but filed no cross-bill and set up no rights and offered no testimony in support of any rights in and to the waters involved herein, to wit: Big Indian Mining Company, John Merrigan, Margaret P. Roe, Gus Ruegg, Chris Robertson, and James Sweet.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED, that as to the said defendants who entered no appearance and failed to demur, plead, answer or file a cross-bill, and who failed, neglected and refused to introduce any testimony, or make proof of any rights in and to the waters of said streams, that the said bill of complaint be taken *pro confesso* as against each and all of said defendants, and it is hereby ORDERED, ADJUDGED AND DECREED, that each and all of said defendants are entitled to none of the waters of Prickly Pear Creek, or any of its tributaries, and that each and all of said named defendants be and they are hereby perpetually enjoined and restrained from in any manner and in anywise interfering with, molesting or intermeddling with any of the water rights of any and all of the other parties herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that each of the parties hereto shall pay his own costs.

Dated, signed and passed this fifth day of October, A. D. 1911.

FRANK S. DIETRICH,
District Judge, Acting in the District of Montana,
Under a Special Assignment. [132]

[Endorsed]: No. 668. In the Circuit Court of the United States, Ninth Circuit, District of Montana. Ames Realty Company, Plaintiff, vs. Big Indian Mining Company et al., Defendants. Decree. Filed and Entered Oct. 7, 1911. Geo. W. Sproule, Clerk. [133]

And thereafter, on October 16, 1911, an Order Correcting Clerical Errors in Decree was filed and entered herein, being in the words and figures following, to wit: [134]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

AMES REALTY COMPANY,

Plaintiff,

vs.

BIG INDIAN MINING COMPANY et al.,

Defendants.

Order Correcting Clerical Errors in Decree.

Attention having been called to certain clerical errors and omissions in the decree filed herein October 7th, 1911, it is ordered that such errors and

omissions be corrected and supplied as follows, to wit:

The amount awarded to Christian Nelson should be 55 instead of 33 inches, as appears in Memorandum of Decision filed herein August 7th, 1911;

And as appears in the same memorandum, Charles E. Brown, as the successor of J. J. Hall, should have 60 instead of 30 inches from Spring Creek;

And as appears from the Original Memorandum filed herein, the decree should award to A. H. Moulton 45 inches from Prickly Pear Creek of date, April 1st, 1865.

These corrections are accordingly made in the decree heretofore signed, and the Clerk of the court is directed to make the necessary additions and alterations in the record if the Decree has already been entered.

Dated this fourteenth day of October, 1911.

FRANK S. DIETRICH,

District Judge, Acting in the District of Montana
Under Special Assignment. [135]

[Endorsed]: No. 668. In the Circuit Court of the United States, Ninth Circuit, District of Montana. Ames Realty Company, Plaintiff, vs. Big Indian Mining Company et al., Defendants. Order Correcting Clerical Errors in Decree. Filed Oct. 16, 1911. Geo. W. Sproule, Clerk. [136]

And thereafter, on April 10, 1912, an Assignment of Errors of defendant R. S. Hale was filed herein, being in the words and figures following, to wit:
[137]

*In the District Court of the United States for the
District of Montana.*

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, Helena & Livingston Smelting and Reduction Company, a Corporation, Helena Land and Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenech, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead,

Lind Warneck, Kate Cassidy, C. W. Jenson, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Theis, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clarke, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, and J. B. Maxfield,

Defendants,

and

CONRAD-STANFORD COMPANY, a Corporation, D. A. G. Flowerree, William Warren, John L. Bunnell, Hugh Rogan, Patrick Rogan, W. L. Milligan, Peter Hilger, H. L. Cram, Martin Woldson, T. W. Synnott, S. M. Meadows, A. P. Hanson, John Bower, C. B. Kountz, Sophia Symes, Catherine Symes, John F. Symes, George G. Symes and W. G. Preuitt,

Intervenors. [138]

Assignment of Errors.

And now, on this the tenth day of April, A. D. 1912, came the defendant, Robert S. Hale, by his solicitor, Massena Bullard, and says that the decree entered in the above cause on the sixteenth day of October, 1911, is erroneous and unjust to the defendant, Robert S. Hale.

First. Because the Circuit Court of the United States for the Ninth Circuit, District of Montana, erred in not finding, adjudging and decreeing this defendant to be entitled to all the waters of Lump Gulch Creek and its tributaries, above the point of the diversion of the waters of said creek by the Park Ditch of this defendant, described in this defendant's cross-bill of complaint, as against all other parties,—complainant, defendants and intervenors,—to this action.

Second. Because the Circuit Court of the United States for the Ninth Circuit, District of Montana, erred in not embracing in its decree herein an injunction enjoining and restraining all other parties,—complainant, defendants and intervenors,—to this action, from in any way or manner, or to any extent, interfering with the use by this defendant, Robert S. Hale, of all the waters of Lump Gulch Creek and its tributaries, above the point of diversion of said waters by the Park Ditch of this defendant, described in this defendant's cross-bill of complaint.

Wherefore the above-named defendant, Robert S. Hale, prays that the said decree be reversed, and that a decree be entered herein finding, adjudging

and decreeing this defendant to be entitled to all the waters of Lump Gulch Creek and its tributaries, above the point of the diversion of the waters of said creek by the Park Ditch of this defendant, described in this defendant's cross-bill of complaint, as against all other parties,—complainant, defendants and intervenors,—to this action, and enjoining and restraining all other parties,—complainant, defendants and intervenors,—to this action, from in any way or manner, or to any extent, interfering with the use by this defendant, Robert S. Hale, of all the waters [139] of Lump Gulch Creek and its tributaries, above the point of diversion of said waters by the Park Ditch of this defendant, described in this defendant's cross-bill of complaint.

MASSENA BULLARD,

Solicitor for Defendant, Robert S. Hale.

[Indorsed]: Title of Court and Cause. Assignment of Errors. Filed April 10, 1912. Geo. W. Sproule, Clerk. [140]

And thereafter, on April 10, 1912, a Petition for Appeal and Order allowing same were filed and entered herein, being in the words and figures following, to wit: [141]

In the District Court of the United States for the District of Montana.

No. 668—IN EQUITY.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation, Helena & Livingston Smelting and Reduction Company, a Corporation, Helena Land and Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenc, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley,

R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, C. W. Jenson, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clarke, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle and J. B. Maxfield,

Defendants,

and

CONRAD-STANFORD COMPANY, a Corporation, D. A. G. Flowerree, William Warren, John L. Bunnell, Hugh Rogan, Patrick Rogan, W. L. Milligan, Peter Hilger, H. L. Cram, Martin Woldson, T. W. Synnott, S. M. Meadows, A. P. Hanson, John Bower, C. B. Kountz, Sophia Symes, Catherine Symes, John F. Symes, George G. Symes and W. G. Preuitt,

Intervenors. [142]

Petition for Appeal.

Filed April 10, A. D. 1912, in the District Court of the United States for the District of Montana.

To the Hon. GEORGE M. BOURQUIN, District Judge of the District Court of the United States for the District of Montana:

The above-named defendant, Robert S. Hale, feeling himself aggrieved by the decree made and entered in this cause on the sixteenth day of October, A. D. 1911, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

MASSENA BULLARD,

Solicitor for Defendant and Appellant, Robert S. Hale.

Order Allowing Appeal, etc.

On this tenth day of April, 1912, came the above-named defendant, Robert S. Hale, by his solicitor, Massena Bullard, Esq., and moved the Court to be allowed an appeal from the decree of this court

herein rendered and entered on the — day of October, 1911, to the United States Circuit Court of Appeals for the Ninth Circuit.

On the filing of the assignment of errors by the said defendant, [143] and appellant, the Court does hereby allow the said appeal, and does hereby fix the amount of the bond on the said appeal in the sum of Three Hundred Dollars, and the Court further orders that a certified transcript of the record, proceedings and papers upon which said decree appealed from was based or rendered, duly authenticated, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this tenth day of April, 1912.

By the Court,

GEO. M. BOURQUIN,
District Judge.

[Indorsed]: Title of Court and Cause. Petition for Appeal. Filed April 10, 1912. Geo. W. Sproule, Clerk. [144]

And thereafter, on April 10, 1912, a Bond on Appeal was approved and filed herein, being as follows, to wit: [145]

In the District Court of the United States for the District of Montana.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation;
Helena & Livingston Smelting and Reduction Company, a Corporation Helena Land and Improvement Company, a Corporation; Chicago Reduction Works, a Corporation; H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenech, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, C. W. Jenson, D. W.

Beach, Benjamin Borgstede, M. J. McDaniel,
 H. L. Goudy, James Boone, John Merrigan,
 William Ogilvie, Jacob Kahler, I. W. Marks,
 Chris Robertson, Chris Wickersham, H. O.
 Nash, Anna E. Nash, Charles Koegle, Herman
 Freyler, I. B. Cutler, William Albright, T. H.
 Carter, Gus Ruegg, James H. Mulhollen, Ger-
 hard Thies, Charles O'Connell, Martin Broen,
 Nellie R. Ricketts, Robert Lynnes, Peter
 Leary, Mary Leary, Frank Bruce, Frank
 Clarke, James A. Carrier, S. I. Deal, F. M.
 French, F. Mason, E. C. Drosch, H. W. Fry, A.
 L. Thorn, J. W. Holt, E. J. Harris, Charles A.
 Donnelly, H. E. Minter, B. N. J. Miljouer,
 Benjamin Wahle and J. B. Maxfield,

Defendants,

and

CONRAD-STANFORD COMPANY, a Corpora-
 tion, D. A. G. Flowerree, William Warren,
 John L. Bunnell, Hugh Rogan, Patrick
 Rogan, W. L. Milligan, Peter Hilger, H. L.
 Cram, Martin Woldson, T. W. Synnott, S. M.
 Meadows, A. P. Hanson, John Bower, C. B.
 Kountz, Sophia Symes, Catherine Symes,
 John F. Symes, George G. Symes and W. G.
 Preuitt,

Intervenors. [146]

Bond on Appeal.

Know All Men by These Presents: That we,
 Robert S. Hale, as principal, and United States
 Fidelity & Guaranty Company as surety, acknowl-
 edge ourselves to be jointly indebted to Ames Realty

Company, a corporation; Big Indian Mining Company, a corporation; Helena & Livingston Smelting and Reduction Company, a corporation; Helena Land and Improvement Company, a corporation; Chicago Reduction Works, a corporation; H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenech, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, C. W. Jenson, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clarke, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A.

Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, J. B. Maxfield, Conrad-Stanford Company, a corporation, D. A. G. Flowerree, William Warren, John L. Bunnell, Hugh Rogan, Patrick Rogan, W. L. Milligan, Peter Hilger, H. L. Cram, Martin Woldson, T. W. Synnott, S. M. Meadows, A. P. Hanson, John Bower, C. B. Kountz, Sophia Symes, Catherine Symes, John F. Symes, George G. Symes and W. G. Preuit, appellees in the above cause, in the sum of Three Hundred Dollars, [147] conditioned that, whereas, on the sixteenth day of October, A. D. 1911, in the Circuit Court of the United States for the Ninth Circuit, District of Montana, in a suit depending in that court, wherein said Ames Realty Company was complainant, and the said Robert S. Hale and the said named appellees other than said Ames Realty Company were defendants or intervenors, numbered on the equity docket as 668, a decree was rendered, and the said Robert S. Hale having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree, and a citation directed to the said appellees citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, in the State of California, on the eleventh day of May, A. D. 1912, next:

Now, if the said Robert S. Hale shall prosecute his appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be void;

else to remain in full force and virtue.

Dated April 10th, A. D. 1912.

ROBERT S. HALE.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY. [Seal]

By CLINTON O. PRICE,
Attorney in Fact.

Approved April 10, A. D. 1912.

GEO. M. BOURQUIN,
District Judge.

[Indorsed]: Title of Court and Cause. Bond
on Appeal. Filed April 10, 1912. Geo. W. Sproule,
Clerk. [148]

And thereafter, on April 10, 1912, a Praecipe for
Transcript was filed herein, being in the words
and figures following, to wit: [149]

*In the District Court of the United States for the
District of Montana.*

IN EQUITY—No. 668.

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corpora-
tion, et al.,

Defendants.

Praeceptum for Transcript.

To the Clerk of said court:

Please prepare transcript on appeal in above-entitled action as follows:

Bill of complaint.

Subpoena.

Answer of defendant Hale.

Cross-bill of defendant Hale.

Transcript of testimony as hereinafter specified, the same being all the testimony necessary on the hearing of the appeal, to wit:

Stipulation, dated January 22, 1907.

Statement as to title of lands of defendant, Robert S. Hale, filed August 28, 1907.

Testimony of Robert S. Hale, page 964 to 972.

Testimony of John H. Shober, page 973 to 975.

Testimony of Robert S. Hale, page 976.

Deposition of Patrick Woods.

Deposition of D. A. G. Flowerree.

Deposition of William L. Steele.

Testimony of E. W. Payne beginning with the question, "Do you [150] remember a man by the name of A. M. Woolfolk?" on page 1662, and ending with the answer, "It may have been as late as 1870," line 3, page 1663.

Testimony of W. L. Millegan beginning with the question, "Did you know A. M. Woolfolk?" on page 1667, to and including the answer, "I don't think there was any signers when he came to my house. I lived right on the road," on page 1669.

Testimony of William Warren beginning with the question, "Did you know A. M. Woolfolk?" on page

1671, to and including the answer, "It seems like it. I have been in the valley a long time," on page 1672.

Testimony of Christmas G. Evans, page 1673 to 1674, and down to and including line 20 on page 1675, and that portion of page 1677 from and including the question, "Did you own a ranch in the Prickly Pear Valley in connection with your partner, Mr. Sanford," etc., to the close of the testimony of said witness on said page.

Testimony of H. L. Cram beginning with the question, "You have been sworn as a witness in this case before?" on page 1678, to and including the answer "Hardy Jones, J. H. were his initials," on same page.

Testimony of Hugh J. Rogan beginning with the question, "You are the same Hugh J. Rogan that has testified heretofore in this case, are you?" on page 1680, to and including the answer, "Well, the shortage started to come along about, say, 1895 or 1896, and from that on down," being the last answer on that page (1680).

Testimony of S. M. Meadows beginning with the question, "What is your full name, residence and occupation?" on page 1736, to and including the answer, "Twenty-six or seven years," on same page, and beginning with first question on page 1738 to the conclusion of the testimony of said witness on said page.

Opinions of the Court.

Decree as finally entered October 16, 1911.

Dated April 10, 1912.

MASSENA BULLARD,

Solicitor for Defendant and Appellant, Robert S. Hale.

[Indorsed]: Title of Court and Cause. Praeceptum for Transcript. Filed April 10, 1912. Geo. W. Sproule, Clerk. [151]

And thereafter, on April 11, 1912, a Citation was issued herein, which is hereunto annexed and is in the words and figures following, to wit:
[152]

*In the District Court of the United States for the
District of Montana.*

AMES REALTY COMPANY, a Corporation,
Complainant,

vs.

BIG INDIAN MINING COMPANY, a Corporation; Helena & Livingston Smelting and Reduction Company, a Corporation; Helena Land and Improvement Company, a Corporation; Chicago Reduction Works, a Corporation; H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenech, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George

Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, C. W. Jenson, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clarke, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle and J. B. Maxfield,

Defendants,

and

CONRAD-STANFORD COMPANY, a Corporation, D. A. G. Flowerree, William Warren, John L. Bunnell, Hugh Rogan, Patrick Rogan, W. L. Milligan, Peter Hilger, H. L. Cram, Martin Woldson, T. W. Synnott, S. M. Meadows, A. P. Hanson, John Bower, C. B. Kountz, Sophia Symes, Catherine Symes, John F. Symes, George G. Symes and W. G. Preuitt,

Intervenors. [153]

Citation on Appeal.

United States of America to Ames Realty Company, a Corporation, Big Indian Mining Company, a Corporation, Helena & Livingston Smelting and Reduction Company, a Corporation, Helena Land & Improvement Company, a Corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian Nelson, Antone Semenech, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, C. W. Jenson, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin

Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clarke, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle, J. B. Maxfield, Conrad-Stanford Company, a Corporation, D. A. G. Flowerree, William Warren, John L. Bunnell, Hugh Rogan, Patrick Rogan, W. L. Milligan, Peter Hilger, H. L. Cram, Martin Woldson, T. W. Synnott, S. M. Meadows, A. P. Hanson, John Bower, C. B. Kountz, Sophia Symes, Catherine Symes, John F. Symes, George G. Symes and W. G. Preuitt:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, [154] to be held at the city of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the District of Montana, wherein Ames Realty Company, a Corporation, is complainant, and Big Indian Mining Company, a Corporation, Helena & Livingston Smelting and Reduction Company, a corporation, Helena Land and Improvement Company, a corporation, Chicago Reduction Works, a Corporation, H. M. Hill, Ole Noer, Perry Parks, James Clegg, Mary B. Logan, J. A. Fischer, Christina Winslow, George Cockell, John J. Hall, Asleck Slenes, Marion D. Steves, James J. Sweet, A. H. Moulton, Christian

Nelson, Antone Semenech, William R. Sherman, Lawrence Wonderer, Davis C. Turner, Benjamin Z. Young, Joseph W. Young, Joseph Kastner, George E. Webster, John Pohl, John O'Keefe, Reynolds Prosser, William Bevins, M. A. Haynes, J. Ellis, Fred Hart, Edward Heater, Robert Stroble, John Haab, Margaret P. Roe, John T. Murphy, Malcolm D. McRae, George Herbert, E. L. Marks, Charles B. Zastrow, Harry Johnson, Lizzie Bailey, Michael Foley, R. S. Hale, Trued Swanson, Otto Hofstead, Lind Warneck, Kate Cassidy, C. W. Jenson, D. W. Beach, Benjamin Borgstede, M. J. McDaniel, H. L. Goudy, James Boone, John Merrigan, William Ogilvie, Jacob Kahler, I. W. Marks, Chris Robertson, Chris Wickersham, H. O. Nash, Anna E. Nash, Charles Koegle, Herman Freyler, I. B. Cutler, William Albright, T. H. Carter, Gus Ruegg, James H. Mulhollen, Gerhard Thies, Charles O'Connell, Martin Broen, Nellie R. Ricketts, Robert Lynnes, Peter Leary, Mary Leary, Frank Bruce, Frank Clarke, James A. Carrier, S. I. Deal, F. M. French, F. Mason, E. C. Drosch, H. W. Fry, A. L. Thorn, J. W. Holt, E. J. Harris, Charles A. Donnelly, H. E. Minter, B. N. J. Miljouer, Benjamin Wahle and J. B. Maxfield are defendants, and Conrad-Stanford Company, a Corporation, D. A. G. Flowerree, William Warren, John L. Bunnell, Hugh Rogan, Patrick Rogan, W. L. Milligan, Peter Hilger, H. L. Cram, Martin Woldson, T. W. Synnott, S. M. Meadows, A. P. Hanson, John Bower, C. B. Kountz, Sophia Symes, [155] Catherine Symes, John F. Symes, George G. Symes and W. G. Preuitt are intervenors,

to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Hon. GEORGE M. BOURQUIN, Judge of the District Court of the United States for the District of Montana, this eleventh day of April, A. D. 1912.

GEO. M. BOURQUIN,
District Judge.

Service of foregoing citation accepted and copy received this eleventh day of April, 1912.

O. W. McCONNELL,
Solicitor for Complainant.

SHOBER & RASCH, and
CARL RASCH,
Solicitors for Certain Defendants.

M. S. GUNN,
Solicitor for Certain Defendants.

IRA T. WIGHT,
Solicitor for Certain Defendants.

H. S. HEPNER,
Solicitor for Certain Defendants.

H. G. & S. H. McINTIRE,
C. A. SPAULDING,
Solicitors for Certain Defendants.

GALEN & METTLER,
Solicitors for Certain Defendants.

EDWARD HORSKY,
Solicitor for Certain Defendants.

O. W. McCONNELL,
Solicitor for Certain Intervenors.

W. D. TIPTON,

Solicitor for Certain Intervenors.

A. P. HEYWOOD,

Solicitor for Certain Defendants and Intervenors.

A. I. LOEB &

JAMES A. WALSH,

Solicitors for Harry C. Boyers & Nettie Burgess.

Service of citation on appeal in the case of Ames Realty Company, a Corporation, vs. Big Indian Mining Company et al., in the District Court of the United States for the District of Montana, accepted and copy of said citation received this fifteenth day of April, 1912.

D. M. KELLY,

Solicitor for Certain Defendants. [156]

[Endorsed]: No. 668. Ames Realty Company, a Corporation, Complainant, vs. Big Indian Mining Company, a Corporation, et al., Defendants. Citation on Appeal. Filed and entered Apr. 22, 1912. Geo. W. Sproule, Clerk. [157]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 158 pages, numbered consecutively from 1 to 158, inclusive, is a true and correct transcript of those por-

tions of the pleadings, process, orders and testimony, and of the decree and opinions of the court, and all other proceedings had in said cause, specified in the praecipe for transcript filed herein, as appears from the original files and records of said court in my possession as such Clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of One Hundred Twenty-one 10/100 Dollars (\$121.10/100), and that the same have been paid by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Helena, Montana, this 2d day of May, A. D. 1912.

[Seal]

GEO. W. SPROULE,

Clerk. [158]

[Endorsed]: No. 2144. United States Circuit Court of Appeals for the Ninth Circuit. Robert S. Hale, Appellant, vs. Ames Realty Company, a Corporation, et al., Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Received May 7, 1912.

F. D. MONCKTON,

Clerk.

Filed May 18, 1912.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

